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EDITOR'S NOTE

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No. 86-260-CFX
Status: GRANTED

Title: South Dakota, Petitioner
V.
Elizabeth H. Dole, Secretary, United States
Department of Transportation

Docketed:
August 18, 1986

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Tellinghuisen, Roger

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 18 1986	G	Petition for writ of certiorari filed.
2	Sep 15 1986		Brief amicus curiae of National Beer Wholesalers' Association filed.
4	Sep 23 1986		Order extending time to file response to petition until October 20, 1986.
5	Sep 22 1986		Brief amicus curiae of Colorado, et al. filed.
6	Oct 20 1986		Order further extending time to file response to petition until November 3, 1986.
7	Nov 4 1986		Order further extending time to file response to petition until November 7, 1986.
8	Oct 31 1986		Brief amicus curiae of Phillip J. MacDonell, et al. filed.
9	Nov 7 1986		Brief of respondent Elizabeth Dole in opposition filed.
10	Nov 12 1986		DISTRIBUTED. November 26, 1986
11	Dec 1 1986		Petition GRANTED. *****
12	Dec 22 1986	G	Motion of petitioner to dispense with printing the joint appendix filed.
14	Jan 5 1987		Order extending time to file brief of petitioner on the merits until January 22, 1987.
15	Jan 12 1987		Motion of petitioner to dispense with printing the joint appendix GRANTED.
16	Jan 21 1987		Brief amicus curiae of National Beer Wholesalers' Assn., et al. filed.
17	Jan 22 1987		Brief amicus curiae of Natl. Conference of State Legislatures, et al. filed.
18	Jan 22 1987		Brief amicus curiae of Mountain States Legal Foundation, et al. filed.
19	Jan 22 1987		Brief amicus curiae of Phillip J. MacDonell, et al. filed.
20	Jan 22 1987		Brief of petitioner South Dakota filed.
21	Jan 22 1987		Brief amicus curiae of Colorado, et al. filed.
22	Jan 22 1987		Lodging received.
24	Feb 9 1987		Order extending time to file brief of respondent on the merits until March 16, 1987.
25	Feb 12 1987		Record filed.
26	Feb 12 1987		Certified copy of original record and proceedings, 2 volumes, received.
27	Mar 12 1987		Brief amicus curiae of Natl. Safety Council filed.
28	Mar 11 1987		SET FOR ARGUMENT. Tuesday, April 28, 1987. (3rd case).
29	Mar 13 1987		Brief amicus curiae of National Council on Alcoholism, et al. filed.
30	Mar 16 1987		Brief of respondent Elizabeth H. Dole filed.

Entry	Date	Note	Proceedings and Orders
31	Mar 14 1987	Brief amicus curiae of U.S. Senator Lautenberg, et al filed.	
32	Mar 16 1987	Brief amicus curiae of Insurance Institute for Highway Safety, et al. filed.	
34	Mar 20 1987	CIRCULATED.	
36	Apr 11 1987	LODGING by Solicitor General. Report by GAO - "Drinking Age Laws: An Evaluation Synthesis" (1 copy)	
37	Apr 18 1987	X Reply brief of petitioner South Dakota filed.	
38	Apr 28 1987	ARGUED.	

**PETITION
FOR WRIT OF
CERTIORARI**

86-260 (1)

Supreme Court, U.S.

FILED

AUG 18 1986

JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE STATE OF SOUTH DAKOTA,

Petitioner,

v.

THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
IN HER OFFICIAL CAPACITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

DOES 23 U.S.C. § 158, THE NATIONAL MINIMUM DRINKING AGE, AS AMENDED THROUGH APRIL 7, 1986, UNCONSTITUTIONALLY DISPLACE THE STATE'S CORE POWER, UNDER THE TWENTY-FIRST AMENDMENT, UNITED STATES CONSTITUTION, TO SET MINIMUM DRINKING AGES?

II

DOES 23 U.S.C. § 158, THE NATIONAL MINIMUM DRINKING AGE, VIOLATE THE TENTH AMENDMENT, UNITED STATES CONSTITUTION, BY DISPLACING THE STATE'S CORE POWER TO SET DRINKING AGES, GRANTED TO THE STATE BY THE TWENTY-FIRST AMENDMENT?

PARTIES TO THE PROCEEDINGS IN THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

Petitioner, the State of South Dakota, has been a party to this litigation from the beginning. Petitioner will be referred to as "the State." Respondent, the Honorable Elizabeth H. Dole, Secretary of the United States Department of Transportation, has also been a party to this litigation from the beginning. She will be referred to as "the Secretary" or "Secretary Dole."

(i)

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	iv
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE WRIT	10
I. THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OF OTHER UNITED STATES COURTS OF APPEALS.	10
II. THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.	28
CONCLUSION	32
APPENDIX	

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>Bacchus Imports, Ltd. v. Dias,</u> 468 U.S. 263, 274-276 (1984)	PASSIM
<u>Battipaglia v. New York State</u> <u>Liquor Authority, 745 F.2d 166</u> (2nd Cir. 1984), <u>cert. denied,</u> 105 S.Ct. 1393 (1985)	13
<u>Blatnik Co. v. Ketola, 587 F.2d</u> 379 (8th Cir. 1978)	13
<u>Brown-Forman Distillers v. New York</u> <u>State Liquor Authority, 106 S.Ct.</u> 2080, 2887-2088, 2090-2091 (1986)	11, 30
<u>California v. LaRue, 409 U.S. 109,</u> 118-119 (1972), <u>reh'g. denied,</u> 410 U.S. 948 (1973)	11
<u>California Retail Liquor Dealers</u> <u>Assn. v. Midcal Aluminum, 445 U.S.</u> 97, 106-108, 110 (1980); 446 U.S. 949 (1980)	PASSIM
<u>Capitol Cities Cable, Inc. v.</u> <u>Crisp, 467 U.S. 691, 712-714</u> (1984)	PASSIM
<u>Castlewood International Corp. v.</u> <u>Miller, 626 F.2d 1200 (5th Cir.</u> 1980)	13, 15
<u>Castlewood International Corp. v.</u> <u>Simon, 596 F.2d 638, 642</u> (5th Cir. 1979)	12, 15, 24

<u>Craig v. Boren</u> , 429 U.S. 190, 205-208 (1984)	11, 26
<u>Doran v. Salem Inn, Inc.</u> , 422 U.S. 922, 932-933 (1975)	11
<u>Dunagin v. City of Oxford, Miss.</u> , 718 F.2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259 (1984)	12, 15
<u>Felix v. Young</u> , 536 F.2d 1126, 1131-1134 (6th Cir. 1976)	13
<u>Harris v. McRae</u> , 448 U.S. 297, reh'g denied, 448 U.S. 917 (1980)	23
<u>Hostetter v. Idlewild Bon Voyage Liquor Corp.</u> , 377 U.S. 324, 332 (1964)	25
<u>Joseph E. Seagram & Sons, Inc. v. Hostetter</u> , 384 U.S. 35, 41-42 (1966)	12
<u>Lawrence County v. Lead-Deadwood School District #40-1</u> , 105 S.Ct. 695, 703 (1985)	21
<u>Mohoney v. Joseph Triner Corp.</u> , 304 U.S. 401 (1938)	12
<u>New York State Liquor Authority v. Ballanca</u> , 452 U.S. 714, 715-716 (1981)	11
<u>North Carolina v. Pearce</u> , 395 U.S. 711 (1969)	23

(iv)

<u>Oklahoma v. Civil Service Comm'n</u> , 330 U.S. 127, 143-144 (1947)	20, 21, 22, 24
<u>Olitsky v. O'Malley</u> , 597 F.2d 295 (1st Cir. 1979)	13
<u>Paladino v. City of Omaha</u> , 471 F.2d 812 (8th Cir. 1972)	13
<u>S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm.</u> , 709 F.2d 291 (5th Cir. 1983)	12
<u>Sherbert v. Verner</u> , 374 U.S. 398 (1963)	22
<u>State Board of Equalization v. Young's Market Co.</u> , 299 U.S. 59, 63-64 (1936)	12
<u>State of South Dakota v. Dole</u> , 791 F.2d 628, 632-633 (8th Cir. 1986)	14, 16, 19
<u>Tinker v. Des Moines Independent School District</u> , 393 U.S. 503, n.2 at 506 (1969)	23
<u>Ziffrin, Inc. v. Reeves</u> , 308 U.S. 132, 138 (1939)	12
<u>STATUTORY REFERENCES:</u>	
Pub.L. 98-363, § 6, 98 Stat. 435, 437-438	7
Pub.L. 99-272, Title IV, § 4101	7

(v)

S.D. Codified Laws Ann.
§ 35-4-78 (1977) 9

S.D. Codified Laws Ann.
§ 35-6-27 (1985 Supp.) 9

United States Code

23 U.S.C. § 158 3, 26, 31

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 9

28 U.S.C. § 1331 8

28 U.S.C. § 2101(c) 10

28 U.S.C. § 2201 8

28 U.S.C. § 2202 8

OTHER REFERENCES:

76 Cong.Rec. 4138 (1933) 17

76 Cong.Rec. 4143 18

76 Cong.Rec. 4146 (1933) 18

76 Cong.Rec. 4147 (1933) 18

76 Cong.Rec. 4229 (1933) 17

Federal Rules of Civil Procedure
Rule 12(b)(6) 9, 21

U. S. Const., Art. I,
§ 8, cl. 1 2, 21, 25

U. S. Const., Art. I, § 8, cl. 3 2

(vi)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in State of South Dakota v. Dole, is reported at 791 F.2d 628, and appears in the Appendix (A-2). The judgment of the Court of Appeals, dated and filed May 21, 1986, also appears in the Appendix (A-39). The opinion of the United States District Court for the District of South Dakota, Western Division, is unreported. A copy appears in the Appendix (A-24), as does a copy of the District Court's judgment. (A-40)

(vii)

NO. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

THE STATE OF SOUTH DAKOTA,

Petitioner,

v.

THE HONORABLE ELIZABETH H. DOLE,
SECRETARY, UNITED STATES DEPARTMENT
OF TRANSPORTATION, IN HER OFFICIAL
CAPACITY,

Respondent.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was dated and entered May 21, 1986. This Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

1. United States Constitution, Article I,
Section 8, Clause 1:

§8. The Congress shall have power:

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

2. United States Constitution, Article I,
Section 8, Clause 3:

[The Congress shall have power:]

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

3. United States Constitution, Amendment
10:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

4. United States Constitution, Amendment
21, Section 2:

§2. The transportation or importation into any state, territory, or possession of the United States for

delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

5. 23 U.S.C. § 158, National Minimum
Drinking Age, as amended through
April 7, 1986:

§ 158. National minimum drinking age

(a) Withholding of funds for noncompliance.--

(1) First Year.--The Secretary shall withhold 5 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(2), 104(b)(5), and 104(b)(6) of this title on the first day of the fiscal year succeeding the first fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

(2) After the first year.--The Secretary shall withhold 10 per centum of the amount required to be apportioned to any State under each of section 104(b)(1), 104(b)(2), 104(b)(5) and 104(b)(6) of this title on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

(3) State grandfather law as complying.--If, before the later of (A) October 1, 1986, or (B) the tenth day

following the last day of the first session the legislature of a State convenes after the date of the enactment of this paragraph, such State has in effect a law which makes unlawful the purchase and public possession in such State of any alcoholic beverage by a person who is less than 21 years of age (other than any person who is 18 years of age or older on the day preceding the effective date of such law and at such time could lawfully purchase or publically possess any alcoholic beverage in such State), such State shall be deemed to be in compliance with paragraph (1) and (2) of this subsection in each fiscal year in which such law is in effect.

(b) Period of availability; effect of compliance and non-compliance.

(1) Period of availability of withheld funds.--

(A) Funds withheld on or before September 30, 1988.--Any funds withheld under this section from apportionment to any State on or before September 30, 1988, shall remain available for apportionment to such State as follows:

(i) If such funds would have been apportioned under section 104(b)(5)(a) of this title but for this section, such funds shall remain available until the end of the fiscal year for which such funds are authorized to be appropriated.

(ii) If such funds would have been apportioned under section 104(b)(5)(B) of this title but for this section, such funds shall remain available until the end of the second fiscal year following the fiscal year for which such funds are authorized to be appropriated.

(iii) If such funds would have been apportioned under section 104(b)(1), 104(b)(2) or 104(b)(6) of this title but for this section, such funds shall remain available until the end of the third fiscal year following the fiscal year for which such funds are authorized to be appropriated.

(B) Funds withheld after September 30, 1988.--No funds withheld under this section from apportionment to any State after September 30, 1988, shall be available for apportionment to such State.

(2) Apportionment of withheld funds after compliance.--If, before the last day of the period for which funds withheld under this section from apportionment are to remain available for apportionment to a State under paragraph (1)(A), the State makes effective a law which is in compliance with subsection (a) the Secretary shall on the day following the effective date of such law apportion to such State the withheld funds remaining available for apportionment to such State.

(3) Period of availability of subsequently apportioned funds.--Any funds apportioned pursuant to paragraph (2) shall remain available for expenditure as follows:

(A) Funds apportioned under section 104(b)(5)(A) of this title shall remain available until the end of the fiscal year succeeding the fiscal year in which such funds are so apportioned.

(B) Funds apportioned under section 104(b)(1), 104(b)(5)(B) or 104(b)(6) of this title shall remain available until the end of the third fiscal year succeeding the fiscal year in which such funds are so apportioned.

Sums not obligated at the end of such period shall lapse or, in the case of funds apportioned under section 104(b)(5) of this title, shall lapse and be made available by the Secretary for projects in accordance with section 118(b) of this title.

(4) Effect of noncompliance.--If, at the end of the period for which funds withheld under this section from apportionment are available for apportionment to a State under paragraph (1), the State has not made effective a law which is in compliance with subsection (a), such funds shall lapse or, in the case of funds withheld from apportionment under section 104(b)(5) of this title, such funds shall lapse and be made available by the Secretary for projects in accordance with section 118(b) of this title.

(c) Alcoholic beverage defined.--As used in this section, term "alcoholic beverage" means--

(1) beer as defined in section 5052(a) of the Internal Revenue Code of 1954,

(2) wine of not less than one-half of 1 per centum of alcohol by volume, or

(3) distilled spirits as defined in section 5002(a)(8) of such Code.

STATEMENT OF THE CASE

In June, 1984, Congress passed, and the President signed, a bill amending the Surface Transportation Act of 1982. Public Law 98-363, Section 6, 98 Stat. 435, 437-438. The Act, as amended, requires that each state adopt a minimum drinking age of 21. If any state fails to do so, on or before October 1, 1986, it is to have five per cent of its fiscal year 1987 federal aid highway funds withheld by the Secretary, even though the funds were otherwise apportioned to the State. In fiscal year 1988, ten per cent of such funds would be withheld.

As amended by Pub.L. 99-272, Title IV, § 4101, the statute requires that the funds

withheld prior to September 30, 1988, be available for apportionment to states adopting, after September 30, 1986, a drinking age of 21. This availability would continue for one, two, or three fiscal years after appropriation of the funds, depending on the type of funds involved. No funds withheld after September 30, 1988 would be available for apportionment to non-complying states.

The State of South Dakota brought this action challenging the constitutionality of the Act. The complaint was filed in United States District Court for the District of South Dakota, Western Division, in September, 1984. (See Appendix A-41). The District Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331, since the case presented a federal question. Relief was sought under 28 U.S.C. §§ 2201 and 2202, the declaratory judgment act. The complaint alleged that setting drinking ages is a core

power of the State within the Twenty-first Amendment, United States Constitution. South Dakota presently permits possession and purchase of low point beer (beer of less than 3.2 per cent alcohol by weight) by persons 19 and 20 years old. S.D. Codified Laws Ann. §§ 35-4-78 (1977) and 35-6-27 (1985 Supp.). Defendant filed a motion to dismiss in December, 1984, contending that the conditioning of a congressional grant on any state action is constitutional and violates neither the Tenth nor the Twenty-first Amendments (see Appendix A-52). The District Court, acting pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), dismissed the Complaint on May 3, 1985. (See Appendix A-24 and A-41).

The State appealed the dismissal of its complaint to the United States Court of Appeals for the Eighth Circuit on June 26, 1985, pursuant 28 U.S.C. § 1291. That Court affirmed by opinion and judgment dated and

filed May 21, 1986. This Petition has been filed within 90 days of that date. 28 U.S.C. § 2101(c); Supreme Court Rule 20.2.

REASONS FOR GRANTING THE WRIT

I

THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OF OTHER UNITED STATES COURTS OF APPEALS.

A. Introduction.

This case presents the issue of the nature and extent of state powers under the Twenty-first Amendment, United States Constitution, when state and federal liquor regulations conflict. It is the State's contention that the Eighth Circuit decision below overstepped clear guidelines in the decisions, and that the petition should be granted for this reason.

B. The State's Powers Under the Twenty-First Amendment.

This Court has recognized that Section 2 of the Twenty-first Amendment grants the states something more than traditional police powers over liquor traffic and trade within the state's borders. See, e.g. Brown-Forman Distillers v. New York State Liquor Authority, 106 S.Ct. 2080, 2087-2088 (Court's opinion) and 2090-2091 (Stevens, J., dissenting) (1986); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 274-276 (1984); Capitol Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712-714 (1984); New York State Liquor Authority v. Bellanca, 452 U.S. 714, 715-716 (1981); California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 106-108, 110 (1980); Craig v. Boren, 429 U.S. 190, 205-208 (1984); Doran v. Salem Inn, Inc., 422 U.S. 922, 932-933 (1975); California v. LaRue, 409 U.S. 109, 118-119 (1972), reh'g. denied, 410 U.S. 948 (1973); Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35,

41-42 (1966); Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939); Mohoney v. Joseph Triner Corp., 304 U.S. 401 (1938); State Board of Equalization v. Young's Market Co., 299 U.S. 59, 63-64 (1936). These, and many other, cases have recognized that the Twenty-first Amendment is an affirmative grant of power to the states to regulate liquor more extensively than they may regulate other items or products in commerce. The Fifth Circuit has held that the Twenty-first Amendment fundamentally restructured the federal system as it relates to liquor regulation. Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983) cert. denied, 467 U.S. 1259 (1984); S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm., 709 F.2d 291 (5th Cir. 1983); Castlewood International Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979); vacated and rem. for further

consideration in light of California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), 446 U.S. 949 (1980); opinion reinstated after remand, Castlewood International Corp. v. Miller, 626 F.2d 1200 (5th Cir. 1980). Other circuits have also recognized that the states' interest in liquor regulation is much stronger than its interest in other police power areas, because of the Twenty-first Amendment. Battipaglia v. New York State Liquor Authority, 745 F.2d 166 (2nd Cir. 1984) cert. denied, 105 S.Ct. 1393 (1985); Olitsky v. O'Malley, 597 F.2d 295 (1st Cir. 1979); Felix v. Young, 536 F.2d 1126, 1131-1134 (6th Cir. 1976). Indeed, this principle has been recognized by the Eighth Circuit itself. Blatnik Co. v. Ketola, 587 F.2d 379 (8th Cir. 1978); Paladino v. City of Omaha, 471 F.2d 812 (8th Cir. 1972).

In contrast to the weight of the cited authority, the Eighth Circuit in this case specifically held that: "We reject the State's contention that its power to establish a minimum drinking age flows from the Twenty-first Amendment," State of South Dakota v. Dole, 791 F.2d 628, 632 (8th Cir. 1986). The apparent grounds for this holding were that the State could have regulated drinking ages even without the Amendment. This ruling misses the point. Certainly the police power supports the State's establishment of a drinking age. That is not to say, however, that the Twenty-first Amendment does not. Midcal, 445 U.S. at 110, states that the central, or core, power under the Twenty-first Amendment is that of exercising "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." (Emphasis supplied) To find that this does not include the

setting of a drinking age is contrary to this Court's decisions. The writ should be granted for this reason.

C. The Twenty-First Amendment Limits Congressional Action.

In reaching its decision in this case, the Eighth Circuit also held that the Twenty-first Amendment did not decrease the powers of the Congress in regulating intoxicating liquors. This holding conflicts with that of the Fifth Circuit in Castlewood International Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979); Castlewood International Corp. v. Miller, 626 F.2d 1200 (5th Cir. 1980) and Dunagin v. City of Oxford, Miss., 718 F.2d. at 744 (majority) and 754 (Williams, J., concurring) (5th Cir. 1983).

It is also inconsistent with this Court's employing of a balancing test in Bacchus, 468 U.S. at 275-276, Crisp, 467 U.S. at 714, Midcal, 445 U.S. at 106-108, and the other cases cited herein. If the powers of

Congress were not decreased, there would be no reason for the express language of the Amendment prohibiting importation or transportation of liquor into the state for delivery or use therein in violation of the laws of that state. Simply put, if states may now prohibit the consumption of liquor, or structure their own liquor distribution systems regardless of congressional action to the contrary, the powers of Congress are necessarily less than they were before December 5, 1933. The Eighth Circuit, however, expressly held to the contrary. State of South Dakota v. Dole, 791 F.2d at 632-633.

The Eighth Circuit does recognize, in theory, that a balancing test could be employed to prefer state regulation over federal in some instances. Dole at 633. The fact that the Eighth Circuit refuses to recognize that congressional power was reduced by the Twenty-first Amendment, however, almost certainly affected that Court's view

of the competing constitutional clauses and the state and federal interests involved.

The failure to recognize the contraction of congressional power brought about by the Twenty-first Amendment compounded the Eighth Circuit's initial failure to recognize that the Twenty-first Amendment supported the State's regulation of drinking ages. The language of the Amendment, the primary focus of its interpretation, Midcal, 445 U.S. at 107, n. 10, fully supports this analysis. The analysis is also supported, however, by the following from the congressional debates that preceded the Amendment's adoption. In its original proposed form, the Amendment contained the following as Section 3:

Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.

76 Cong. Rec. 4138 (1933). The Senate rejected this section. 76 Cong. Rec. 4229 (1933). In the course of the debate, Senator

Blaine stated that the section was removed as incompatible with Section 2, which was intended to deliver primary control over intoxicating liquors to the states. 76 Cong.Rec. 4143. In addition, Senator Wagner noted as follows:

The real cause of the failure of the Eighteenth Amendment was that it attempted to impose a single standard of conduct on all the people of the United States without regard to local sentiment or local habits.

76 Cong.Rec. 4146 (1933).

Senator Wagner later suggested that a federal drinking age was exactly the type of regulation that was barred:

If Congress may regulate the sale of intoxicating liquors where they are to be drunk on premises where sold, then we shall probably see Congress attempt to declare what hours such premises may be open, where they shall be located, how they shall be operated, the sex and age of the purchasers, the price at which the beverages are to be sold. (Emphasis supplied.)

76 Cong.Rec. 4147 (1933).

In explicitly holding that the Twenty-first Amendment did not contract federal power, the Eighth Circuit disregarded the language of the Amendment, the holdings of this Court and other Courts of Appeals, and the clear intent of the Amendment's framers. For this reason, the writ should be granted.

D. The State and Federal Interests Conflict in this Case.

The Eighth Circuit in State of South Dakota v. Dole, 791 F.2d at 633-634, also held that no balancing of state and federal interests is necessary in this case because the state and federal legislation do not conflict. This conclusion was based on the premise that the State is not required to raise its drinking age, but may simply refuse and forego the percentage of federal funds involved. This conclusion was based upon this Court's holdings in cases such as

Oklahoma v. Civil Service Comm'n, 330 U.S. 127, 143-144 (1947), that Congress may condition its granting of funds on accomplishment of goals it could not directly legislate.

This Eighth Circuit holding conflicts with the holdings of this Court, cited above, in Bacchus, 468 U.S. at 274-276, Crisp, 467 U.S. at 712-714 and Midcal, 445 U.S. at 106-108, and other cases because it fails to recognize that the State's powers under the Twenty-first Amendment are different from, and more extensive than, its other powers. The Twenty-first Amendment specifically granted power over liquor to the states. In so doing, it withdrew some power from the Congress. The Eighth Circuit failed to recognize these constitutional demands and thus found no conflict between state and federal legislation.

Initially, the Eighth Circuit glosses over two important qualifications of the Oklahoma doctrine. First, Oklahoma recognized that Congress could not coerce a state into doing Congress's will. Because this case was dismissed on a Federal Rules of Civil Procedure, Rule 12(b)(6) motion, there has been no fact-finding conducted as to whether the loss of these federal funds would so impair the State's existence or its functioning in the federal system that coercion is involved.

Second, this Court has recognized that Congress, in exercising its spending power, Art. I, § 8, Cl. 1, United States Constitution, may not violate a controlling constitutional provision. Lawrence County v. Lead-Deadwood School District #40-1, 105 S.C. 695, 703 (1985). Congress has done so in this case by attempting to specifically displace the State's delegated powers

under the Twenty-first Amendment. The earlier sections of this petition demonstrate that the State has been specifically granted the right to regulate alcohol by that Amendment. Congress, by its spending power, is assuming a power that the Amendment withdrew from it. The situation is thus much different from that in Oklahoma. In that case, the powers of the state arose from sources outside the United States Constitution. In this case, the power arises from the United States Constitution. In Oklahoma, the Congress sought to impose conditions which may have been beyond its power to legislate directly. In this case, Congress seeks to impose a condition when the power to legislate has been withdrawn from it by the Constitution.

This principle is illustrated by several holdings of this Court relating to individuals. In Sherbert v. Verner, 374 U.S. 398

(1963), this Court held that a Seventh Day Adventist could not constitutionally be required to choose between cash unemployment benefits and her right to exercise her religion freely by not working on Saturday. The Court held that where the Constitution extended her the right to freely exercise her religion, she could not be forced to choose between that right and receipt of government benefits to which she was otherwise entitled. The Court stated likewise in Harris v. McRae, 448 U.S. 297, reh'g denied, 448 U.S. 917 (1980) (no penalty found in denying funds to indigent to obtain a legal abortion); Tinker v. Des Moines Independent School District, 393 U.S. 503, n.2 at 506 (1969) (Public school could not set conditions of attendance violating specific constitutional guarantees), and North Carolina v. Pearce, 395 U.S. 711 (1969) (due process bars in-

crease in sentence as a penalty for exercising right to appeal). In this case, the State may not be forced to give up a specific constitutional power in exchange for money, and by so requiring, Congress violated the principles of these cases.

The State would note, however, that this argument does not require any fundamental restructuring of precedent under Oklahoma. The Twenty-first Amendment is unique in granting powers to the State. No other provisions of the Constitution make such a grant. See Castlewood International Corp v. Simon, 596 F.2d at 642.

Because it failed to recognize the nature of the State's powers under the Twenty-first Amendment, and the consequent decrease in federal power, the Eighth Circuit overlooked the true conflict between state and federal law present in this case. For this reason, the writ should be granted.

E. The Balance in this Case Must be Struck in Favor of the State.

The Eighth Circuit refused to engage in the balancing required by this Court in Hostetter v. Idlewild Bon Voyage Liquor Corp, 377 U.S. 324, 332 (1964), and also in Bacchus Imports, Ltd. v. Dias, 468 U.S. at 274-276; Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 712-714; and California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc., 445 U.S. at 110. By refusing to engage in a balancing of interests, the Eighth Circuit violated the principles of these cases. The balance should be struck in favor of the State. This conflict should be resolved by this Court.

The interest asserted by the federal government in this case is a generalized interest in the "general welfare" under Art. I, § 8, cl. 1 of the United States Constitution. This same interest could be

asserted regarding any product, service or subject of federal or state regulation. The State, on the other hand, asserts its specifically delegated interest in regulating alcohol. This interest is sufficiently weighty that it has been specifically recognized by the United States Constitution, Amendment Twenty-one. The establishment of a drinking age is at the core of Twenty-first Amendment powers. See Craig v. Boren, 429 U.S. at 205-208 (1976); Midcal, 445 U.S. at 106-108. The State thus asserts a specific power, the federal government a general power.

The Congress did, admittedly, refer to safety and protection of life in its adoption of 23 U.S.C. § 158. The State, however, asserts that its drinking age is a safety, or temperance, measure. South Dakota believes that its drinking age is more conducive to temperance and safety by controlling

inevitable drinking by 19 and 20-year-olds. The state limits the percentage of alcohol in beverages that the 19 and 20-year-olds may consume. South Dakota controls their drinking by giving them access to legal drinking, as opposed to surreptitious drinking and driving that would inevitably occur. In fact, South Dakota believes more teenagers will drink in automobiles because they will have no lawful gathering places.

The interests, temperance and safety, cited by the State and the Congress, are the same. The interests should, therefore, be balanced by determining which entity--state or federal--has the power of alcohol regulation delegated to it. This question is answered by all the cases cited in this Petition. Since the Eighth Circuit placed itself in conflict with those cases by refusing to balance the interests, the writ should be granted.

THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. Introduction

As this petition indicates, the State has a specifically delegated power to regulate alcohol distribution and consumption inside its borders. This power is shared with all of the states. Since all states regulate alcohol, they all have an interest in protecting this power. If the Congress, however, may establish a drinking age through a spending clause subterfuge, it may, with impunity, displace all state regulation of alcohol. In the future, Congress could assume total regulation of alcohol by spending subterfuge. Since setting of a national drinking age withdraws the power of all states to make this choice, and since this power is specifically protected by the

Twenty-first Amendment, the writ should be granted.

B. This Court Should Address This Matter at this Time.

As the entirety of this Petition indicates, the Twenty-first Amendment delegates certain powers to the states. Without doubt, one of the core powers is the setting of a drinking age. See Congressional materials cited at 17-19. This power, and the other powers at the core of the Twenty-first Amendment, are protected by a specific section of the Constitution. Section 2, Twenty-first Amendment. They are thus unlike those powers arguably protected by the Tenth Amendment. The framers of the Twenty-first Amendment intended to carve out an area within which the states would have virtually complete control. Midcal, 445 U.S. at 110. These powers are reserved to all the states, and there is, therefore, a significant

interest in all states in protecting them. Because of the specific nature of these powers, and the national interest in protection of them, this Court should address the issue now.

This contention is supported by the nature of the congressional action in this case. The State is not aware of any other legislation whereby Congress, since December 5, 1933, has attempted to tread to such a significant degree on the states' Twenty-first Amendment powers. The situation is far different from advertising regulation (Crisp) anti-trust enforcement (Midcal) discriminatory taxation (Bacchus), or an attempt by a state to regulate out of state sales (Brown-Forman, 106 S.Ct. at 2087-2088). In this case, Congress seeks to directly regulate all sale of alcohol within all states. If such regulation is permitted, nothing remains of state powers.

The Congress has also sought to commandeer the state's Twenty-first Amendment powers by 23 U.S.C. § 158. Apparently, Congress, under the Eighth Circuit decision, may order the states to expend their own funds and use their own powers in whatever way Congress intends. None of the states have any protection for their local choices, and may, in fact, be forced to use their strictly local powers in the way Congress dictates. This is the direct opposite of the intent of the Twenty-first Amendment's framers. See Congressional materials cited at 17-19 of this Petition.

The states require protection for their specifically delegated Twenty-first Amendment powers. The Congress has not respected these powers, but has sought to take the powers captive and use them for its own purposes. The congressional action in this case is significantly more intrusive than that considered

in any of this Court's past cases. The case is national in scope because the Twenty-first Amendment powers are shared by all states. For these reasons, the writ of certiorari should be granted.


CONCLUSION

By enacting its own drinking age, Congress has usurped the powers granted by the Twenty-first Amendment to the states. The Eighth Circuit opinion in this case failed to recognize the nature of the State's powers, failed to properly limit Congress and failed to engage in the balancing required by this Court and other federal courts of appeal. The case thus presents a nationally-important question of federal-state relations that should be addressed by this Court. The State of South Dakota respectfully requests that

this Petition for Certiorari be granted.

Dated this 14th day of August, 1986.

MARK V. MEIERHENRY


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APPENDIX

APPENDICES

- A. Opinion of the United States Court of Appeals for the Eighth Circuit . . . A-2
- B. Opinion of the United States District Court for the District of South Dakota, Western Division A-24
- C. Judgment of the United States Court of Appeals for the Eighth Circuit . . A-39
- D. Judgment of the United States District Court for the District of South Dakota, Western Division A-40
- E. Complaint filed by the State of South Dakota in the United States District Court for the District of South Dakota Western Division A-41
- F. Motion to Dismiss filed by the Secretary, United States Department of Transportation, in the United States District Court for the District of South Dakota, Western Division A-52

APPENDIX A

STATE OF SOUTH DAKOTA,
Appellant,

v.

ELIZABETH H. DOLE, Secretary,
United States Department of
Transportation, Washington, D.C.,
in her official capacity,

Appellee.

United States Court of Appeals,
Eighth Circuit.
No. 85-5223

Submitted February 13, 1986

Filed May 21, 1986

Appeal from the United States District Court
for the District of South Dakota

Before ARNOLD, Circuit Judge, TIMBERS,*
Senior Circuit Judge, and FAGG, Circuit
Judge.

FAGG, Circuit Judge.

The State of South Dakota appeals the
dismissal of its complaint challenging the

* The HONORABLE WILLIAM H. TIMBERS, Senior
United States Circuit Judge for the Second
Circuit, sitting by designation.

dismissal of its complaint challenging the
constitutionality of a 1984 amendment to the
Surface Transportation Assistance Act of
1982. 23 U.S.C. § 158. The challenged
amendment was enacted under Congress's spend-
ing power, U.S. Const. art. I, § 8, cl. 1,
and was intended to encourage states to raise
their minimum drinking age to twenty-one.
Finding no constitutional impediment to
Congress's action, we affirm the district
court's dismissal of South Dakota's com-
plaint.

I

BACKGROUND

The law challenged by South Dakota was
enacted by Congress in July of 1984 and
provides:

(a)(1) The Secretary [of
Transportation] shall withhold
5 per centum of [a State's highway
funds] * * * on the first day of
the fiscal year succeeding the
fiscal year beginning after
September 30, 1985, in which the

purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

(2) The Secretary [of Transportation] shall withhold 10 per centum of [a State's highway funds] * * * on the first day of the fiscal year succeeding the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

(b) The Secretary [of Transportation] shall promptly apportion to a State any funds which have been withheld * * * under subsection (a) of this section * * * if in any succeeding fiscal year such State makes unlawful the purchase or public possession of any alcoholic beverage by a person who is less than twenty-one years of age.

* * *

23 U.S.C. § 158.

In essence, that law requires the Secretary of Transportation (Secretary) to withhold a percentage of a state's federal highway funds in fiscal years 1987 and 1988 if, by October 1, 1986, the state has not

adopted a minimum drinking age of twenty-one. Id. § 158(a). Funds withheld in 1987 (five percent) and 1988 (ten percent) may be reapportioned to a state if the state "in any succeeding fiscal year" raises its minimum drinking age to twenty-one. Id. § 158(b).

South Dakota presently allows individuals under the age of twenty-one to purchase certain types of alcoholic beverages. As a result, South Dakota will be ineligible to receive five percent of its 1987 (approximately \$4,000,000) and ten percent of its 1988 (approximately \$8,000,000) federal highway funds unless it adopts a minimum drinking age of twenty-one. South Dakota argues that Congress, by enacting this law, has impermissibly impaired the state's exclusive and constitutionally protected right to regulate the consumption of alcoholic beverages within the state and as a consequence has violated both the twenty-first amendment

and the tenth amendment of the United States Constitution.

In response, the Secretary concedes the state's broad power to regulate extensively the traffic, sale, manufacture, and consumption of alcohol within the state. The Secretary also concedes that incident to that broad power is the authority to establish a minimum drinking age within the state. The Secretary asserts, however, that the state's power to regulate alcohol is not exclusive and does not preclude Congress from addressing alcohol related problems of a nationwide (rather than purely local) nature.

Specifically, the Secretary contends the law at issue falls within the scope of Congress's authority under the spending clause. By conditioning a small portion of a state's federal highway funds on the adoption of a minimum drinking age of twenty-one, Congress has attempted to enlist the state's

cooperation in addressing an evil--drunk driving--that not only transcends state lines but, in Congress's view, is actually aggravated by state lines. Further, the Secretary argues that this law undermines no attribute of sovereignty retained by the state and in no way diminishes the state's power to regulate extensively the traffic, sale, manufacture, and consumption of alcohol within the state.

II

CONGRESS'S POWER UNDER THE SPENDING CLAUSE

Congress's power under the spending clause is a separate and distinct grant of legislative authority and is in no way limited by its other broad legislative powers. Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (opinion by Burger, C.J.); Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (per curiam); United States v. Butler, 297 U.S. 1, 65-66 (1936). That power, when viewed in conjunction with the necessary and

proper clause, is quite expansive, Buckley v. Valeo, 424 U.S. at 90, and without question includes the authority to attach conditions to the receipt and further expenditure of federal funds, see Fullilove v. Klutznick, 448 U.S. at 474 (opinion by Burger, C.J.) (citing cases that uphold Congress's placement of conditions on the receipt of federal funds).

Congress's power under the spending clause is not, however, unlimited. First, in exercising that power, Congress must seek to further the well-being of a particular region or locality. United States v. Butler, 297 U.S. at 64-67; see also, Helvering v. Davis, 301 U.S. 619, 640-41 (1937); Steward Machine Co. v. Davis, 301 U.S. 548, 586-87 (1937). Further, any conditions imposed by Congress must be reasonably related to the national interest Congress seeks to advance. See Massachusetts v. United States, 435 U.S. 444, 461 (1978) (opinion by Brennan, J.).

Finally, these conditions must not violate any "independent constitutional bar," Lawrence County v. Lead-Deadwood School District, 105 S.Ct. 695, 703 (1985), or "controlling constitutional prohibition," King v. Smith, 392 U.S. 309, 333 n.34 (1968). See also, Buckley v. Valeo, 424 U.S. at 91.

South Dakota does not contend either that Congress acted unreasonably in concluding the national welfare is advanced by expending federal funds to develop and maintain a national highway system or that Congress could not reasonably believe drunk drivers represent a serious threat to the safe and uninterrupted use of these highways. Rather, South Dakota challenges the means adopted by Congress to further the nation's interest in safe highways.

In its debates over the bill that became 23 U.S.C. § 158, Congress evidenced the growing national concern over the problem of

drunk driving. Virtually without exception, the members of Congress, while often disagreeing on what should or could be done about the problem, agreed that the problem of drunk driving disproportionately touches the lives of young adults. See generally 130 Cong. Rec. S8208-47 (daily ed. June 26, 1984); 130 Cong. Rec. H5395-407 (daily ed. June 1, 1984) (the House and Senate debates over the proposed legislation).

Significantly, as evidenced by their debates, most members of Congress also believed the problem of young adults drinking and driving is not purely a local or intra-state problem but rather is a problem with substantial national and interstate ramifications. Specifically, as a result of the patchwork of differing state laws, young adults who are unable to consume alcohol legally in their home state often drive to states having lower drinking ages. Then,

after consuming varying amounts of alcohol, these individuals attempt to return home, often with tragic and even fatal results. See, e.g., 130 Cong. Rec. S8228 (daily ed. June 26, 1984) (statement of Sen. Mitchell); id. at S8239 (statement of Sen. Bradley and statement of Sen. Biden); id. at S8241 (statement of Sen. Huddleston and statement of Sen. Hollings); 130 Cong. Rec. H5395 (daily ed. June 1, 1984) (statement of Rep. Anderson); id. at H5398 (statement of Rep. Barnes); id. at H5402 (statement of Rep. Coats and statement of Rep. Porter).

Given this reality, Congress concluded that encouraging states to adopt a uniform minimum drinking age of twenty-one would not only increase the safety of our nation's highways and save thousands of lives but would also protect the valuable national resource represented by our nation's youth. Thus, as a means to achieving these ends,

Congress conditioned a portion of each state's federal highway funds on the state's adoption of a minimum drinking age of twenty-one.

Giving appropriate deference to Congress's view of the national welfare and the means necessary to promote that welfare, see Buckley v. Valeo, 424 U.S. at 91; Helvering v. Davis, 301 U.S. at 640-41, 644-45, we believe Congress reasonably could have concluded the problem of young adults drinking and driving is not a purely local or intra-state concern but rather is a concern of interstate and national proportions. We further believe Congress, in its reasoned discretion, could determine that a uniform minimum drinking age would lessen that problem and improve the safety of our nation's highways for all Americans. Finally, we conclude Congress's decision to condition a portion of a state's federal highway funds on

the adoption of a minimum drinking age of twenty-one is reasonably related to Congress's interest in achieving a nationally uniform minimum drinking age. Leaving aside any specific constitutional prohibition, we find that section 158 falls within the scope of Congress's power under the spending clause.

South Dakota argues, however, that regardless of the apparent reasonableness of Congress's action, two independent and controlling constitutional provisions prevent Congress from exercising its spending power as it has in this instance. More specifically, South Dakota points to the twenty-first amendment and the tenth amendment as affirmative prohibitions on Congress's enactment of 23 U.S.C. § 158.

III

THE TWENTY-FIRST AMENDMENT

South Dakota's argument under the twenty-first amendment focuses on section 2 of that amendment. That section provides:

The transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2. South Dakota contends that this provision represents an all encompassing and exclusive grant of authority to the states. South Dakota argues further that this grant effectively prohibits the federal government from enacting legislation of the type here at issue. We disagree.

As an initial matter, we reject the state's contention that its authority to establish a minimum drinking age flows from the twenty-first amendment. Both before and after the adoption of the twenty-first amendment, the Supreme Court has recognized the

state's authority under its police power to regulate extensively the traffic, sale, manufacture, and consumption of alcohol within the state. See e.g., California v. LaRue, 409 U.S. 109, 114 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971); Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-39 (1939); Crane v. Campbell, 245 U.S. 304, 307 (1917); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Kidd v. Pearson, 128 U.S. 1 (1888); Mugler v. Kansas, 123 U.S. 623 (1887). Without question, that power includes the authority to determine the age at which young adults would be allowed to purchase and consume intoxicating liquor. Cf. Craig v. Boren, 429 U.S. 190, 210 n.24 (1976); Crowley v. Christensen, 137 U.S. at 91 (Under the state's police power "restrictions may be imposed as to the class of persons to whom [liquor] may be sold.").

In contrast with the state's position, we believe the twenty-first amendment was intended to effect a much narrower grant of authority. Specifically, the primary intent of the twenty-first amendment was to authorize the state (where it would otherwise be prohibited from doing so) to regulate directly the transportation or importation of liquor into the state, see Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964); State Board of Equalization v. Young's Market Co., 299 U.S. 59, 62 (1936), in effect, to create "an exception to the normal operation of the Commerce Clause," Craig v. Boren, 429 U.S. at 206 (cited with approval in Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984)); see also, 76 Cong. Rec. 4140-41 (1933) (statement of Sen. Blaine).

Additionally, even in the area of the commerce clause, where the impact of the

twenty-first amendment is clearest, the state's power to regulate liquor is not exclusive. Rather, the Supreme Court has repeatedly emphasized that, in addition to the state's broad authority to regulate liquor within the state, the federal government retains its authority under the commerce clause to regulate interstate commerce in liquor. See e.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 713; California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 108 (1980); Nippert v. City of Richmond, 327 U.S. 416, 425 n.15 (1946); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 299 (1945); Jameson & Co. v. Morgenthau, 307 U.S. 171, 172-73 (1939) (per curiam).

By analogy, if Congress's authority to legislate under the commerce clause is unaffected by the twenty-first amendment, we have little doubt that its authority under

the spending clause is equally unaffected. At bottom while the twenty-first amendment in no way increased Congress's authority to legislate with respect to liquor, the amendment did not limit or withdraw Congress's ability to exercise authority under its existing delegated powers, including the spending power.

South Dakota argues, however, that even if Congress is not excluded from adopting section 158, the statute must fall in the face of South Dakota's law to the contrary. Clearly, in the area of alcohol regulation, when state and federal law directly conflict, a balancing of the state and federal interests involved may result in state law prevailing over a conflicting federal enactment. See Bacchus Imports, Ltd. v. Dias, 104 S.Ct. 3049, 3058 (1984); California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. at 109. Such a

result appears most likely when the state law in question is "designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment." Bacchus Imports, Ltd. v. Dias, 104 S.Ct. at 3058-59.

It is equally clear, however, that before a state law may be preferred over a federal law, the two laws must actually conflict with one another. This court may not seek out conflicts between federal and state law where none "clearly exists." Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 45 (1966) (quoting Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960)); see also, Rice v. Norman Williams Co., 458 U.S. 654, 659-61 (1982). Very simply, in this instance, no conflict exists.

Both the federal enactment and South Dakota state law are fully operative; neither law undermines the legal force and effect of the other. In fact, the federal law

necessarily recognizes the state's power to reject Congress's judgment and adopt and legally maintain any drinking age it chooses. South Dakota is entirely free to maintain its law as it now exists and will violate no federal law if it chooses to do so.

We conclude the twenty-first amendment poses no bar to the law enacted by Congress.

IV

THE TENTH AMENDMENT

The state also claims the tenth amendment prohibits Congress from exercising the spending power as it has in this case. Again, we disagree.

In Okalahoma v. Civil Service Commission, 330 U.S. 127 (1947), the Supreme Court made clear that the tenth amendment is not violated when Congress conditions the receipt of federal funds on compliance with certain terms and conditions. Id. at 142-44. That conclusion is not altered when (as is

arguably the case here) the attached conditions implicate areas that Congress could not directly regulate under its other legislative powers. Id. at 143.

Very simply, to the extent a state finds the conditions attached by Congress distasteful, the state has available to it the simple expedient of refusing to yield to what it urges is "federal coercion." Id. at 143-44; see Fullilove v. Klutznick, 448 U.S. at 474; South Dakota v. Adams, 506 F.Supp. 50, 54-59 (D.S.D.), aff'd sub nom. South Dakota v. Goldsmith, 635 F.2d 698 (8th Cir. 1980), cert. denied, 451 U.S. 984 (1981). Here, the same option is open to South Dakota.

The state's tenth amendment argument is further undermined by the Supreme Court's recent conclusion that the principal limitation imposed upon the exercise of an authorized or delegated power "is that inherent in all congressional action--the built-in

restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the states will not be promulgated." Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005, 1020 (1985). Like the Court in Garcia, we conclude that "[i]n the factual setting of [this] case[] the internal safeguards of the political process have performed as intended." Id.

Regardless, South Dakota has failed to demonstrate how section 158 forces the state to restructure its governmental system or functions or impairs the state's integrity or ability to function effectively in the federal system. Further, South Dakota can hardly claim either a vested right in the federal funds being offered or the right to set the conditions on which the money will be

provided. Rather, as stated above, South Dakota is entirely free to reject Congress's offer of federal highway funds and exercise in any way it chooses its authority to establish a minimum drinking age.

We hold that the tenth amendment is not offended by the congressional enactment here at issue.

V

CONCLUSION

We conclude that the law challenged in this action, 23 U.S.C. § 158, falls within the scope of Congress's spending power and violates neither the twenty-first amendment nor the tenth amendment. We thus affirm the district court's dismissal of South Dakota's civil complaint.

A true copy.

ATTEST:

APPENDIX B

STATE OF SOUTH DAKOTA,

v.

ELIZABETH H. DOLE.

CIV 84-5137

United States District Court,
D. South Dakota
Western Division

May 3, 1985

MEMORANDUM OPINION

BOGUE, Chief Judge.

Congress passed the Surface Transportation Assistance Act of 1982 [STAA], as amended, Public Law No. 98-363, § 6, 98 Stat. 435, 437-38 (to be codified at 23 U.S.C. § 158). If implemented, STAA will result in a portion of federal highway funds being withheld from any state which fails to enact a twenty-one year old drinking age for all alcoholic beverages.

The State of South Dakota brought this action against Secretary of Transportation Dole, seeking a declaratory judgment that STAA is unconstitutional and that the federal government lacks authority to withhold funds. The State also seeks an injunction forbidding implementation of STAA.

Secretary Dole moved the Court to dismiss this action on various grounds. She alleges that the State lacks standing; that

the case is not ripe; and that STAA does not violate the Constitution. The Court will discuss these allegations in turn.

I

Secretary Dole argues that South Dakota lacks standing to bring this action. Specifically, the Secretary alleges that any injury to Plaintiff, at this time, is "conjectual," "hypothetical" or "speculative." The Secretary's arguments concerning standing are necessarily linked to her ripeness argument. These arguments are grounded upon the STAA provision which states that no funds will be withheld until 1986. Thus, the State cannot suffer the alleged injury, lost federal funds, until sometime in the future. The Secretary argues that the State may act in the interim and moot this case. The Court disagrees.

The federal declaratory relief under 28 U.S.C. § 2201 is available when those seeking to invoke the

power of federal courts allege an actual case or controversy within the meaning of Article III of the Constitution. [citations omitted] In order to assure the requisite adverseness of interest which 'sharpens presentations of issues upon which the Court so largely depends for illumination of difficult constitutional questions' the parties must possess a 'personal stake in the outcome' of the case.

Blatnik Company v. Ketola, 587 F.2d 379, 381 (8th Cir. 1978) (citing Baker v. Carr, 369 U.S. 186 (1962)).

In addition, the Supreme Court has held, "where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed positions will come into effect. Blanchette v. Connecticut General Insurance Corporation, 419 U.S. 102, 144 (1974).

The clash between the federal scheme and South Dakota law is in place. South Dakota

provides for a special class of low point beer containing "not more than three and two-tenths per centum of alcohol by weight." SDCL 35-1-1. South Dakota allows persons who are 19 years old to purchase low point beer. SDCL 35-6-27. Thus, South Dakota stands to receive fewer federal highway dollars because it allows persons under 21 to purchase alcoholic beverages.

It is true that the State may alter its position before the STAA adversely affects the State. However, it appears likely that the State, if it does so, will act to prevent the loss of federal dollars. It is this precise coercion that the State alleges is unconstitutional. The Court finds that the issues are sharp and nothing is to be gained by postponing a decision of this case. Therefore, the Court finds that the State has standing and that this case is ripe for decision.

II

The State argues that the STAA provisions discussed above violate the State's constitutional rights under the Tenth and Twenty-first Amendments. In pertinent part, the Tenth Amendment states:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The Supreme Court recently discussed the scope of the Tenth Amendment in a different context.

Garcia v. San Antonio Metro. Transit Auth., Slip No. 82-1913 (S.Ct., Feb. 19, 1985).

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the states must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else -- including the judiciary -- deems state involvement to be.

Garcia, Slip No. 82-1913 at p. 17. The

Supreme Court, however, refused to place any practicable limitation on the federal government's authority to impose its will via the Commerce clause. Id. at p. 27. Here, Secretary Dole argues that the spending power provides authority for the STAA and that the STAA does not violate the Tenth Amendment. The Court agrees.

The Supreme Court has addressed a closely related question. The Court was confronted by a Tenth Amendment challenge to a federal scheme which withheld federal assistance to certain projects failing to give a certain percentage of contracts to minority businesses. Fullilove v. Klutznick, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). Chief Justice Burger, writing for the majority, stated:

Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with

federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy.

Fullilove, 448 U.S. at 475.

The Fullilove Court expressly held that the power to provide for the general welfare "is an independent grant of legislative authority, distinct from other broad congressional powers." Id. The Court previously held that the grant of power in the General Welfare Clause is "quite expansive, particularly in view of the enlargement (sic) of power by the Necessary and Proper Clause." Buckley v. Valeo, 424 U.S. 1, 91, 96 S.Ct. 612, 668 (1976).

The plain import of the foregoing is that the Tenth Amendment is not offended by the federal government's conditioning the receipt of funds upon compliance with a condition which Congress deems in the general

welfare. This is precisely what Congress has done in this case. Thus, the State's Tenth Amendment argument must fail.

III

The State's final argument is that Congress has exceeded its authority in this case because of the Twenty-first Amendment, § 2 which states:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The State argues that the Twenty-first Amendment grants exclusive authority to the State to determine the appropriate drinking age in South Dakota. Therefore, argues the State, the negative inducement posed by STAA is nothing more than federal coercion to establish a national drinking age.

The State expends considerable effort carefully constructing a Commerce Clause

straw man and then attacking that non-issue. Secretary Dole founds her argument on the authority of the Spending Clause and specifically the General Welfare Clause contained therein. Since Secretary Dole concedes that the Commerce Clause is not the basis of her argument, the Court will not address that argument.

The first question concerns the parameters of the power granted by the Twenty-first Amendment. The Supreme Court, while providing some general principles, appears to approach this question on a case-by-case basis.

These [Twenty-first Amendment] decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distributions system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the

federal commerce power and in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of these concerns in a 'concrete case'. [citation omitted]

Cal. Retail Liquor Dealers Ass'n. v. Midcal Alum., 445 U.S. 97, 111, 100 S.Ct. 946 (1980).

The question for the Court to answer in such an analysis appears to be "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by STAA to outweigh the federal interests." Bacchus Imports, Ltd. v. Dias, ___ U.S. ___, 104 S.Ct. 3049, 3058 (1984). Or stated another way, "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." Id. (citing Capital Cities Cable,

Inc. v. Crisp, ___ U.S. ___, 104 S.Ct. 2694 (1984)).

The Court now proceeds to attempt application of the above loosely (sic) knit framework to this case. It appears to the Court that Secretary Dole's motion must succeed for two independent reasons and that this matter must be dismissed.

First, it appears that there is no conflict in a constitutional sense between the STAA and the South Dakota statutes. Nothing in the STAA alters in any way the affect of the South Dakota statutes allowing 19 year olds to drink. Certainly, the STAA provides strong incentive for South Dakota to re-evaluate its drinking age. However, since this State has no right to the funds, absent congressional action, the simple fact that the federal government attached strings to the State's eligibility for these federal dollars does not mean that the State cannot

maintain its drinking age, for whatever reason. This, the Twenty-first Amendment allows. However, this Court cannot forbid the federal government from offering inducements to the State to change its mind. This reasoning is supported by the line of cases which specifically approve conditioned grants. See, e.g., Fullilove, 448 U.S. at 475. Since the State is not denied its power to regulate use and possession of alcoholic beverages in the State, the STAA cannot violate the Twenty-first Amendment.

Second, even if the Court assumes *arguendo* that there does exist sufficient friction in the constitutional sense between the STAA and the South Dakota statutes, it appears that balancing of the factors weighs in favor of the federal interests.

The State asserts that its interest is one of being able to act as a sovereign in the area of setting drinking ages. The

Secretary argues that the purpose of the STAA is to save lives on the highways. The State argues that the Court is in no position to evaluate the merit of the Secretary's claim. The Court agrees. However, the Court can recognize that Congress's purpose in passing the disputed portion was highway safety.

As is discussed above, the Court believes that the conflicting provisions can co-exist. Nothing in the STAA prevents the State from maintaining its drinking age. Certainly highway safety is an appropriate subject for Congress to concern itself with. Additionally, the threat to the State's sovereignty is minimal. Therefore, the balance must be struck in favor of the STAA.*

* The Court is somewhat sympathetic to the State's concern. However, in light of the authorities cited, it appears that the State's remedy is a political and not legal one.

For the foregoing reasons, the Court will grant Secretary Dole's Motion to Dismiss.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JUDGEMENT

No. 85-5223SD

State of South Dakota,)	
)	
Appellant,	)	Appeal from the
v.	)	United States
	)	District Court
Elizabeth H. Dole, etc.,	)	of the District
	)	of South Dakota
Appellee.)	

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion of this Court.

May 21, 1986

A true copy.
ATTEST:

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

STATE OF SOUTH DAKOTA,	)	Civ. 84-5137
)	
Plaintiff,)	
)	
v.	)	JUDGMENT
)	
ELIZABETH H. DOLE,)	
)	
Defendant.)	

For the reasons stated in the Court's
Memorandum Decision, it is hereby

ORDERED AND ADJUED (sic) that Plain-
tiff's Complaint is hereby dismissed with
prejudice for failure to state a claim upon
which relief can be granted.

May 3, 1985

ATTEST:

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

STATE OF SOUTH DAKOTA,	)	CIV. 84-5137
)	
Plaintiff,)	
)	
v.	)	COMPLAINT
)	
HONORABLE ELIZABETH H.)	
DOLE, Secretary, United)	
States Department of)	
Transportation,)	
Washington, D.C., in)	
her official capacity,)	
)	
Defendant.)	

The State of South Dakota as Plaintiff
alleges:

JURISDICTION AND VENUE

I

This Court has jurisdiction pursuant to
28 U.S.C. § 1331 and venue pursuant to 28
U.S.C. § 1391(e). The power for this Court
to grant the relief requested is found pur-
suant to 28 U.S.C. §§ 2201 and 2202.

PARTIES

II

The State of South Dakota is one of the United States.

III

Elizabeth H. Dole is the Secretary of the United States Department of Transportation. The Secretary of the United States Department of Transportation is responsible for enforcing 23 U.S.C. § 158.

FACTS

IV

South Dakota prohibited alcoholic beverages of any type from statehood in 1889 until 1896 and again from July 1, 1917, until November, 1934. The Eighteenth Amendment to the United States Constitution prohibited the sale of alcohol from January 29, 1919, until December 5, 1933.

V

The South Dakota Legislature has, since the repeal of Prohibition, created two systems of sale, one for "low-point beer" and one for all other types of alcoholic beverages.

VI

The State of South Dakota prohibits the consumption of all alcoholic beverages, except "low-point beer," by persons under the age of twenty-one years old.

VII

"Low-point beer" in South Dakota is "any malt beverage which contains any alcohol whatsoever but not more than three and two-tenths per centum of alcohol by weight." SDCL 35-1-1(1).

VIII

The Legislature of the State of South Dakota, under the United States Constitution, Twenty-First Amendment, has the sole and

exclusive power to establish the age of consumption of "low point beer" within its borders.

IX

In March 1939, persons over 18 years of age were permitted to drink "non-intoxicating beer," now defined as "low-point beer." In 1965 the age was raised to 19; in 1972 it was lowered to 18.

X

The Legislature of the State of South Dakota, with the concurrence of the Governor, established the age for legal sale and consumption of "low-point beer" at nineteen years of age by the amendment of SDCL 35-6-27 during the 1984 Legislative Session.

XI

South Dakota has enacted statutes dealing with intoxicated drivers and has strictly enforced those statutes.

XII

Since the strict enforcement program dealing with the intoxicated driver was begun by the Governor of the State of South Dakota in 1981, there has been an approximate thirty percent drop in alcohol-related traffic fatalities from 1981 through 1983. This enforcement program has been further advanced by various legislative enactments, such as SDCL 32-23-1.3, SDCL 32-23-3, SDCL 32-23-4, SDCL 32-23-4.1, SDCL 32-23-10.1 and SDCL 32-23-11.1.

XIII

Traffic deaths in South Dakota in which one of the drivers had been drinking has decreased from 100 alcohol-related deaths out of 206 total traffic deaths in 1981; to 73 out of 181 in 1982; to 69 out of 210 in 1983.

XIV

The State of South Dakota is the recipient of funds from the United States

Department of Transportation which are used for highway construction purposes.

XV

On July 17, 1984, Congress purported to establish a national minimum drinking age by the passage of the Surface Transportation and Uniform Relocation Assistance Act of 1984 which in part amended Title 23 of the United States Code, Section 158.

XVI

Section 158, Title 23 of the United States Code, in establishing a national minimum drinking age, also inserts provisions in punishment for failure to establish, through legislation on the state level, a minimum drinking age of twenty-one years of age for all types of alcoholic beverages, including "low point beer."

XVII

The purpose of the legislation is penal in nature, and was, in fact, described in

that manner by its floor sponsor, Senator Lautenberg of New Jersey.

XVIII

The Defendant is required by law to withhold money from the State of South Dakota unless the South Dakota Legislature enacts a law setting the drinking age for all alcoholic beverages, including "low point beer," at 21 years of age.

XIX

States who fail to adopt the purported national drinking age will have highway funds withheld under sections 104(b)(1), 104(b)(2), 104(b)(5) and 104(b)(6) of Title 23, United States Code. The amount to be withheld, pursuant to the law, shall be five percent (5%) beginning in fiscal year 1987, and ten percent (10%) the following fiscal year.

XX

The Defendant will not pay the full amount of federal transportation funds

otherwise entitled to South Dakota unless South Dakota raises its drinking age for all alcoholic beverages, including "low point beer," to 21 years of age, even through the drinking age for intoxicating beverages is now 21 years of age.

XXI

South Dakota, under the legislation, will have \$4,156,000 in federal money withheld in 1987, and \$8,312,000 withheld in 1988 if it fails to enact a drinking age of twenty-one years of age for all alcoholic beverages, including "low-point beer."

XXII

The Twenty-First Amendment to the United States Constitution states:

The transportation or importation into any state for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

XXIII

The Twenty-First Amendment of the United States Constitution grants solely to the States the power to regulate the sale and consumption of beer within their respective jurisdictions.

XXIV

The Tenth Amendment to the United States Constitution states:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

XXV

No law of the State of South Dakota delegates power to control intoxicating liquors to the Defendant.

XXVI

The Twenty-First and Tenth Amendments to the Constitution prohibit the Defendant from the enforcement of the penal provisions of 23 U.S.C. § 158.

XXVII

The United States Congress is without constitutional authority to force the State of South Dakota to enact any statutes dealing with the sale or possession of intoxicating beverages within its borders.

WHEREFORE, the Plaintiff State of South Dakota prays the Court declare as follows:

1. That Congress is without jurisdiction to enact any law which affects the power of the State of South Dakota to allow or prohibit the sale of alcoholic beverages;

2. That Congress' enactment of 23 U.S.C. § 158 is beyond its power granted by the people through the United States Constitution, which power is reserved to the State of South Dakota and other states, and is therefore unconstitutional;

3. That the Defendant is without authority due to the unconstitutionality of 23 U.S.C. § 158 to withhold any funds from the Plaintiff State of South Dakota;

4. That the Defendant be enjoined from taking any action to enforce or implement 23 U.S.C. § 158; and

5. That the Plaintiff State of South Dakota be awarded its costs allowed by statute, and for such other relief as may be just in the circumstances.

September 21, 1984

APPENDIX F

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

STATE OF SOUTH DAKOTA,)	
)	
Plaintiff,)	
)	
v.	)	Civil Action
	)	No. 84-5137
ELIZABETH H. DOLE,)	
)	
Defendant.)	

MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and (b)(6), Fed. R. Civ. P., defendant moves for an order dismissing this action because this Court lacks subject matter jurisdiction and because the Complaint fails to state a claim upon which relief can be granted. The grounds for this motion, set forth more fully in the accompanying Memorandum of Points and Authorities, are that plaintiff lacks standing, the case is not ripe for judicial resolution,

plaintiff is not entitled to declaratory relief and that the conditioning of a federal grant upon enactment of certain legislation does not violate the Tenth and Twenty-first Amendments.

[December 6, 1984]

OPPOSITION BRIEF

(4)
No. 86-260

Supreme Court, U.S.

FILED

NOV 7 1986

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF SOUTH DAKOTA, PETITIONER

v.

**ELIZABETH H. DOLE,
SECRETARY OF TRANSPORTATION**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED

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QUESTION PRESENTED

Whether the Twenty-first Amendment bars Congress from conditioning a grant of federal highway funds to a State upon the State's adoption of a minimum drinking age of 21.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263.....	10, 12
<i>California v. LaRue</i> , 409 U.S. 109	9
<i>California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.</i> , 445 U.S. 97	7, 10, 12, 13, 14
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691.....	7, 10, 13
<i>Craig v. Boren</i> , 429 U.S. 190	7, 8, 9
<i>Department of Revenue v. James B. Beam Distilling Co.</i> , 377 U.S. 341	8
<i>Fullilove v. Klutznick</i> , 448 U.S. 448	10, 11
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528	5, 9
<i>Hostetter v. Idlewild Bon Voyage Liquor Corp.</i> , 377 U.S. 324	13
<i>Lau v. Nichols</i> , 414 U.S. 563	10
<i>Lawrence County v. Lead-Deadwood School District No. 40-1</i> , 469 U.S. 256	10
<i>National League of Cities v. Usery</i> , 426 U.S. 833....	8, 11
<i>New York State Liquor Authority v. Bellanca</i> , 452 U.S. 714	9
<i>Oklahoma v. United States Civil Service Commission</i> , 330 U.S. 127	5, 10, 11
<i>Pennhurst State School v. Halderman</i> , 451 U.S. 1..	6
<i>Seagram & Sons, Inc. v. Hostetter</i> , 384 U.S. 35....	11
<i>Steward Machine Co. v. Davis</i> , 301 U.S. 548	10

IV

Cases—Continued:

Page

<i>United States v. State Tax Commission</i> , 412 U.S. 363	8, 14
<i>United States v. Tax Commission</i> , 421 U.S. 599.....	8
<i>William Jameson & Co. v. Morgenthau</i> , 307 U.S. 171	7, 14
<i>Ziffrin, Inc. v. Reeves</i> , 308 U.S. 132	10

Constitution and statutes:

U.S. Const.:

Art. I:

§ 8:

Cl. 1 (Spending Clause)	3, 6, 7, 8, 9, 10, 11, 12
-------------------------------	---------------------------

Cl. 3 (Commerce Clause)	7, 8, 9, 11, 12
-------------------------------	-----------------

§ 10, Cl. 2 (Export-Import Clause)	8
--	---

Amend. X	3, 5, 8, 14, 15
----------------	-----------------

Amend. XIV (Equal Protection Clause)	7, 8
--	------

Amend. XVIII	12
--------------------	----

Amend. XXI	<i>passim</i>
------------------	---------------

§ 2	4, 7, 12
-----------	----------

Act of July 14, 1984, Pub. L. No. 98-363, § 6, 98	
---	--

Stat. 437-438, 23 U.S.C. (Supp. II) 158	2
---	---

23 U.S.C. (Supp. II) 158	<i>passim</i>
--------------------------------	---------------

23 U.S.C. (Supp. II) 158 (a) (1)	2
--	---

23 U.S.C. (Supp. II) 158 (a) (2)	2
--	---

23 U.S.C. (Supp. II) 158 (b)	2
------------------------------------	---

Federal Alcohol Administration Act, 27 U.S.C.	
---	--

201 <i>et seq.</i>	14
--------------------------	----

S.D. Codified Laws Ann. § 35-6-27 (1986)	2
--	---

Miscellaneous:

76 Cong. Rec. 4143 (1933)	12
---------------------------------	----

130 Cong. Rec. S8209-S8247 (daily ed. June 26,	
--	--

1984)	2
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-260

STATE OF SOUTH DAKOTA, PETITIONER

v.

ELIZABETH H. DOLE,
SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A23) is reported at 791 F.2d 628. The opinion of the district court (Pet. App. A24-A38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1986. The petition for a writ of certiorari was filed on August 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Congress in 1984 enacted Section 158 of Title 23, which directs the Secretary of Transportation to withhold a portion of the federal funds that otherwise would be granted to a State for highway construction if the State permits "the purchase or public possession * * * of any alcoholic beverage" by a person less than 21 years of age. Act of July 14, 1984, Pub. L. No. 98-363, § 6, 98 Stat. 437-438, codified at 23 U.S.C. (Supp. II) 158.¹ The legislative history of Section 158 indicates that it was designed to reduce drunk driving by teenagers, which is one of the major causes of death for individuals in that age group. See 130 Cong. Rec. S8209-S8247 (daily ed. June 26, 1984).

South Dakota permits persons under the age of 21 to purchase beer containing a low percentage of alcohol (S.D. Codified Laws Ann. § 35-6-27 (1986)); it has not adopted a different rule in response to the enactment of Section 158. Fearing a reduction of its federal grant funds, the State commenced this action against the Secretary of Transportation in the United States District Court for the District of South Dakota. It sought a declaration that Section 158 is unconstitutional and an order barring the Secretary from withholding highway construction funds from States that fail to adopt a minimum drinking age of 21 (see Pet. App. A41-A51).

¹ The statute provides for the withholding in fiscal 1987 of 5% of the highway funds otherwise due the State, and in fiscal 1988 for the withholding of 10% of such funds. 23 U.S.C. (Supp. II) 158(a) (1) and (2). If a State subsequently adopts a 21-year minimum drinking age, it may be entitled to recoup funds withheld in prior years. 23 U.S.C. (Supp. II) 158(b).

The district court granted the Secretary's motion to dismiss (Pet. App. A24-A38), rejecting the State's arguments based on the Tenth and Twenty-first Amendments, and the court of appeals unanimously affirmed (Pet. App. A2-A23). The court of appeals held that Section 158 is a valid exercise of Congress's power under the Spending Clause. It observed that this power "is quite expansive and without question includes the authority to attach conditions to the receipt and further expenditure of federal funds" (Pet. App. A7-A8 (citation omitted)). It noted that in legislating under the Spending Clause, Congress must seek to advance the general welfare and that "any conditions imposed by Congress must be reasonably related to the national interest Congress seeks to advance" (*id.* at A8). But the court found that Section 158 easily satisfies these requirements (Pet. App. A12-A13):

We believe Congress reasonably could have concluded the problem of young adults drinking and driving is not a purely local or intrastate concern but rather is a concern of interstate and national proportions. We further believe Congress, in its reasoned discretion, could determine that a uniform minimum drinking age would lessen that problem and improve the safety of our nation's highways for all Americans. Finally, we conclude Congress's decision to condition a portion of a state's federal highway funds on the adoption of a minimum drinking age of twenty-one is reasonably related to Congress's interest in achieving a nationally uniform minimum drinking age.

The court of appeals then turned to petitioner's claim that Section 158 violates affirmative limita-

tions upon Congress's authority contained in Section 2 of the Twenty-first Amendment, which provides that "the transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The court rejected petitioner's assertion that this language grants the states "all encompassing and exclusive * * * authority" (Pet. App. A14) to regulate the use of alcoholic beverages. The court held, rather, that "the twenty-first amendment was intended to effect a much narrower grant of authority. Specifically, the primary intent of the twenty-first amendment was to authorize the State (where it otherwise would be prohibited from doing so) to regulate directly the transportation or importation of liquor into the state, in effect, to create 'an exception to the normal operation of the Commerce Clause'" (Pet. App. A16 (citations omitted)). The court noted that state regulatory authority over alcoholic beverages flows not from the Twenty-first Amendment, but rather from state police power (Pet. App. A15); and that "the state's power to regulate liquor is not exclusive" because Congress "retains its authority under the Commerce Clause to regulate interstate commerce in liquor" (*id.* at A17). The court of appeals concluded that Congress had the affirmative authority to adopt Section 158 because the Twenty-first Amendment "did not limit or withdraw Congress's ability to exercise authority under its existing delegated powers, including the spending power" (Pet. App. A18).

The court of appeals next concluded that Section 158 could not be invalidated on the theory that it was in conflict with South Dakota's law permitting

19-year-olds to buy beer. The court acknowledged that, "in the area of alcohol regulation, when state and federal law directly conflict, a balancing of the state and federal interests involved may result in state law prevailing over a conflicting federal enactment" (Pet. App. A18). But the court held that this principle applies only where "the two laws * * * actually conflict," and it concluded that "no conflict exists" here (*id.* at A19). Because Section 158 "necessarily recognizes the State's power to reject Congress's judgment and adopt and legally maintain any drinking age it chooses," the court noted, "South Dakota is entirely free to maintain its law as it now exists and will violate no federal law if it chooses to do so" (Pet. App. A19-A20).

Finally, the court of appeals determined that Section 158 does not violate the Tenth Amendment. Relying upon *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947), the court held that the Tenth Amendment is not violated when Congress attaches conditions to grants of federal funds. "[T]o the extent a state finds the conditions attached by Congress distasteful," the court said, "the state has available to it the simple expedient of refusing to yield to what it urges is 'federal coercion'" (Pet. App. A21 (citation omitted)). The court of appeals also noted (*id.* at A21-A22) that the State's Tenth Amendment argument was "further undermined" by this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner appears to agree that Section 158 is a valid exercise of Congress's Spending Clause power in the absence of some independent constitutional bar.² The threshold question in this case is whether the Twenty-first Amendment limits Congress's authority under the Spending Clause. We submit that it does not, and that Section 158 is therefore plainly constitutional.

This Court's decisions addressing challenges to federal statutes under the Twenty-first Amendment generally have involved statutes enacted pursuant to

² Although this Court has observed that "[t]here are limits on the power of Congress to impose conditions on the States pursuant to its Spending Power" (*Pennhurst State School v. Halderman*, 451 U.S. 1, 17 n.13 (1981)), petitioner does not contend that Section 158 exceeds those limits. Indeed, Section 158 falls well within Congress's power under the Spending Clause. As the court of appeals recognized (Pet. App. A9-A13), Congress concluded that drunk driving by young adults poses a significant threat to safety on the Nation's roadways, including highways built with federal funds; there is a substantial interstate component to the problem because differences in state drinking laws encourage young people to cross state lines in search of alcoholic beverages, resulting in increased interstate drunk driving. Moreover, Section 158 is moderate in its use of the funding inducement: the initial withholding is 5% of the State's funding allocation, the maximum withholding is 10%, and subsequent adoption of the drinking age limit may enable the State to recoup lost funds. See note 1, *supra*. In these circumstances, there can be no doubt that Congress used its Spending Clause authority for a proper purpose.

Congress's power under the Commerce Clause. See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939). It is upon these decisions that petitioner places its chief reliance. See Pet. 11, 14-15, 17, 20, 25, 26. Because these cases involved the Commerce Clause, however, they provide no authority for the application of the Twenty-first Amendment to limit Congress's authority to legislate under the Spending Clause or under other constitutional grants of authority.

The Court has indicated, moreover, that the principal purpose of the Twenty-first Amendment was to limit the operation of the Commerce Clause with respect to state regulation of the liquor industry. This purpose is evident from the Amendment's language, which speaks of "[t]he transportation or importation into any State . . . of intoxicating liquors." U.S. Const. Amend. XXI, § 2. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court considered whether the Amendment exempted state regulation of liquor sales from the requirements of the Equal Protection Clause. The Court observed that the Amendment was intended to "constitutionalize[] the Commerce Clause framework established under" federal statutes pre-dating Prohibition that had allowed the States to regulate trade in alcoholic beverages free of the implied restrictions of the Commerce Clause (429 U.S. at 206). Thus, "the Amendment primarily created an exception to the normal operation of the Commerce Clause." *Ibid.*; see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 712 (Section 2 of the Twenty-first Amendment "reserves to the States power to impose

burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause").

The Court in *Craig* rejected the argument that the Twenty-first Amendment insulates state liquor regulation from scrutiny under the Equal Protection Clause. "Once passing beyond consideration of the Commerce Clause," the Court stated, "the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful" (429 U.S. at 206). The Court has in fact rejected contentions that the Twenty-first Amendment limits the authority conferred upon the federal government by other provisions of the Constitution. See *United States v. Tax Commission*, 421 U.S. 599 (1975) (federal immunity from state taxes); *United States v. State Tax Commission*, 412 U.S. 363 (1973) (authority to regulate conduct on federal property); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Export-Import Clause).

The same conclusion applies with respect to Congress's authority under the Spending Clause. A Spending Clause enactment like Section 158 by definition does not limit a State's regulatory authority, but only provides an incentive for a State to exercise its regulatory authority in a particular way. Such a statute accordingly does not implicate the state-autonomy concerns that the Twenty-first Amendment was designed to address, and the Amendment therefore has no application in this context. Cf. *National League of Cities v. Usery*, 426 U.S. 833, 852 n.17 (1976) (distinguishing between Commerce Clause and Spending Clause for purposes of limitations found to be imposed by the Tenth Amendment), over-

ruled on other grounds, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

2. Petitioner (Pet. 20-24) and Amicus National Beer Wholesalers' Association (Br. 15-17) have devised another theory to support their contention that Congress's Spending Clause authority is limited by the Twenty-first Amendment. The premise of this theory is that "the Twenty-first Amendment is an affirmative grant of power to the states to regulate liquor," so that a State's authority in this respect assertedly "arises from the United States Constitution" (Pet. 12, 22). Reasoning from this premise, they contend that Section 158 is invalid under the doctrine of unconstitutional conditions because it burdens a State's decision to exercise that "right."

As a threshold matter, the premise of petitioner's argument is incorrect. The Twenty-first Amendment is not the source of the State's authority to regulate the liquor industry. Instead, as the Court observed in *Craig v. Boren*, 429 U.S. at 205, a State's regulation of alcoholic beverages is justified by the State's police power; the Amendment simply removes otherwise applicable Commerce Clause limitations upon the scope of this police power.²

² This Court has described the Twenty-first Amendment "as conferring something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972); see also *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981). But, as the Court observed in *Craig v. Boren*, 429 U.S. at 205-209, that enhancement of the State's authority is principally the result of the removal of the limitations that otherwise would be imposed by the Commerce Clause. Moreover, in both *LaRue* and *Bellanca* the state regulation was aimed at "minimiz[ing] the well-known evils" associated with alcohol and thus was justified by the sort of temperance concerns that the Twenty-

Regardless of the source of the State's authority, moreover, there is no merit in the assertion that Congress's exercise of its Spending Power imposes an unconstitutional condition upon the State's exercise of its police power. Indeed, such a rule could not be reconciled with this Court's precedents regarding Congress's authority under the Spending Clause. On petitioner's theory, any condition attached to a legislative grant of funds would be unconstitutional unless it were independently supported by some clause of the Constitution other than the Spending Clause. In view of this Court's decisions upholding congressional actions under the Spending Clause, this analysis plainly is incorrect. See *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 269-270 (1985); *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.); *Lau v. Nichols*, 414 U.S. 563, 568-569 (1974); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

3. Even if Congress's authority under the Spending Clause were thought to be limited by the Twenty-first Amendment, Section 158 would nevertheless pass constitutional muster. The Twenty-first Amend-

first Amendment was designed to protect. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 139 (1939). Where the state regulation is not motivated by temperance concerns, this Court has noted that fact in denying Twenty-first Amendment protection. *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. at 112-114; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 714-715; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). As we discuss below, there is no support in the record for petitioner's assertion (Pet. 26-27) that temperance concerns motivate its insistence that 19-year-olds be allowed to drink beer.

ment's limits on congressional authority are implicated only when there is an actual conflict between federal and state law. Pet. App. A19; cf. *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 45 (1966). This Court repeatedly has rejected the argument—renewed by petitioner and its supporting amici—that conditions on federal grants are the equivalent of coercive requirements imposed by Congress (for example) under the Commerce Clause. See *Fullilove v. Klutznick*, 448 U.S. at 474 (opinion of Burger, C.J.) (“Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative objectives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate with federal policy.”); *Oklahoma v. United States Civil Service Commission*, 330 U.S. at 143-144. Cf. *National League of Cities v. Usery*, 426 U.S. at 852 n.17 (distinguishing enactments under the Spending Clause from those under the Commerce Clause).

Because Section 158 is an incentive rather than a coercive measure,⁴ the court of appeals correctly concluded that “no conflict exists” between that statute and South Dakota’s law permitting 19-year-olds

⁴ Petitioner (Pet. 21), the National Beer Wholesalers’ Association (Br. 18-19) and the States supporting petitioner as amici curiae (Br. 7-9) assert that the federal statute is in fact “coercive.” But the inability to have one’s cake and eat it too does not demonstrate coercion. Congress could choose to eliminate the entire highway grant program; its decision to condition a relatively small proportion of a State’s federal grant upon the State’s compliance with that condition in no way compels action on the latter’s part.

to drink beer. As the court of appeals put it: "Both the federal enactment and South Dakota state law are fully operative; neither law undermines the legal force and effect of the other. In fact, the federal law necessarily recognizes the state's power to reject Congress's judgment and adopt and legally maintain any drinking age it chooses. South Dakota is entirely free to maintain its law as it now exists and will violate no federal law if it chooses to do so" (Pet. App. A19-A20).⁸

⁸ Petitioner (Pet. 15-19) and Amicus National Beer Wholesalers' Association (Br. 6-7) contend that the Twenty-first Amendment withdraws from Congress the authority to legislate with regard to a minimum drinking age, even if the federal statute does not conflict with state law. But the legislative history of the Amendment, which effected the repeal of the Eighteenth Amendment and the end of Prohibition, in no way suggests an intention to impose such a broad limitation upon federal authority. The Court recently observed that the legislative history of the Amendment reveals "[n]o clear consensus" (*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-275 (1984)). Thus, one legislator's statement that the States would have "absolute authority" over sales of alcoholic beverages (76 Cong. Rec. 4143 (1933) (Sen. Blaine), cited in Pet. 18), was counterbalanced by that same legislator's statement that Section 2 of the Amendment "was designed only to ensure that 'dry' States could not be forced by the Federal Government to permit the sale of liquor"—a purpose that the present case does not remotely implicate. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 107 n.10; see also *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 279-280 n.5 (Stevens, J., dissenting) (observing that, in light of "the dual character of the [Commerce Clause], it is not at all incongruous to assume that the power delegated to Congress by the Commerce Clause is unimpaired while holding the inherent limitation imposed by the Commerce Clause on the States is removed with respect to intoxicating liquors by the Twenty-first Amendment").

4. Even if Congress's authority under the Spending Clause were thought to be limited by the Twenty-first Amendment, and even if there were thought to be a conflict between the federal and state statutes at issue here, Section 158 would nevertheless be valid. As petitioner acknowledges (Pet. 25), the validity of a federal law in such circumstances depends upon a balancing of the relevant federal and state interests. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 712-714; *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 110; *Hos-tetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). The balance here would plainly tip in Section 158's favor.

The first inquiry is whether the allegedly conflicting state law is "aimed at preventing unlawful use of alcoholic beverages within the State" so as to further "the State's interest in promoting temperance" (*Capital Cities Cable, Inc.*, 467 U.S. at 713). Here, South Dakota law *permits* consumption of alcoholic beverages by persons under 21 years of age and therefore cannot easily be viewed as promoting temperance values. Petitioner asserts (Pet. 25-27) that this lower drinking age in fact promotes temperance by discouraging the use of beverages containing a higher concentration of alcohol, but there is nothing in the record to support this assertion. Nor have any of the States supporting South Dakota as amici attempted to justify their lower minimum drinking ages as temperance measures (see Br. 7). Thus, all that underlies the state law is the State's generalized interest in regulating the sale of alcoholic beverages.⁹

⁹ Amicus National Beer Wholesalers' Association asserts (Br. 5-14) that state regulation that "implicates interests at the core of the Twenty-first Amendment" automatically pre-

On the other hand, Section 158 is supported by the federal government's substantial interest in promoting safety on the Nation's highways and the health of the Nation's teenage youth. See page 2, *supra*. In view of this significant interest, and the fact that the federal statute infringes only minimally upon the state rule because it leaves the State free to adopt a different drinking age, the federal statute does not violate the Twenty-first Amendment. See Pet. App. A36-A37.⁷

vails over conflicting federal regulation, and it defines the Amendment's "core" as consisting of "regulations concerning 'importation or sale of liquor'" (Br. 6). This Court's decision in *California Retail Liquor Dealers Association* makes clear that this analysis is incorrect; the Court weighed the relevant interests in that case even though the conflicting state regulation related to the distribution and sale of liquor. As noted in the text, the "core" interest protected by the Twenty-first Amendment is in fact the State's interest in promoting temperance; even that interest must be balanced against the relevant federal interest in assessing the validity of a federal statute under the Twenty-first Amendment (*see, e.g., United States v. State Tax Commission*, 412 U.S. at 373-378), although that State interest would be accorded heavy weight because it lies at the center of the concern of drafters of the Amendment. Contrary to amicus's suggestion (Br. 6 n.4), our brief in *324 Liquor Corp. v. Duffy*, No. 84-2022, does not imply that balancing is inappropriate when a state statute rests upon such a "core" interest; indeed, the brief does not address that issue.

⁷ Petitioner asserts (Pet. 30-31) that Section 158 is "significantly more intrusive" than federal statutes previously upheld by this Court. But petitioner ignores the fact that statutes such as the Federal Alcohol Administration Act, 27 U.S.C. 201 *et seq.*, upheld in *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939), imposed broad mandatory regulations upon the entire liquor industry. The present case, by contrast, involves only a condition on a federal grant.

Petitioner refers to the Tenth Amendment in the questions presented in its petition (at i) but does not repeat its argu-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1986

ment that Section 158 is invalid under the Tenth Amendment. The district court (Pet. App. A29-A32) and the court of appeals (*id.* at A20-A23) correctly rejected that contention.

AMICUS CURIAE

BRIEF

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF SOUTH DAKOTA,
v. *Petitioner,*

ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE*
NATIONAL BEER WHOLESALERS' ASSOCIATION
IN SUPPORT OF THE PETITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i> ..	1
ARGUMENT	2
I. The Twenty-first Amendment Reserves to the States the Authority to Set Minimum Drinking Ages	2
II. Congress May Not Avoid the Limitations on Its Power in the Twenty-first Amendment by Pro- ceeding under the Spending Power	14
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984) ..	4, 13
<i>Battipaglia v. New York State Liquor Authority</i> , 745 F.2d 166 (2d Cir. 1984), cert. denied, 105 S. Ct. 1393 (1985) ..	3, 8-9, 14
<i>Brown-Forman Distillers Corp. v. New York State Liquor Authority</i> , 106 S. Ct. 2080 (1986) ..	13
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) ..	15
<i>California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980) ..	4, 5, 6, 10-11, 14
<i>California v. LaRue</i> , 409 U.S. 109 (1972) ..	3
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984) ..	4, 11, 13
<i>Castlewood International Corp. v. Simon</i> , 596 F.2d 638 (5th Cir. 1979), vacated and remanded, 446 U.S. 949, opinion reinstated, 626 F.2d 1200 (1980) ..	5
<i>Collins v. Yosemite Park & Curry Co.</i> , 304 U.S. 518 (1938) ..	9
<i>Craig v. Boren</i> , 429 U.S. 190 (1976) ..	6, 14
<i>Department of Revenue v. James B. Beam Distilling Co.</i> , 377 U.S. 341 (1964) ..	8, 9, 10, 14
<i>Frost & Frost Trucking Co. v. Railroad Commis- sion</i> , 271 U.S. 583 (1926) ..	16
<i>Gabree v. King</i> , 614 F.2d 1 (1st Cir. 1980) ..	12
<i>Garcia v. San Antonio Metropolitan Transporta- tion Authority</i> , 105 S. Ct. 1005 (1985) ..	17
<i>Hostetter v. Idlewild Bon Voyage Liquor Corp.</i> , 377 U.S. 324 (1964) ..	5, 8, 9, 10, 13
<i>Houser v. State</i> , 85 Wash.2d 803, 540 P.2d 412 (1975) ..	12
<i>Joseph E. Seagram & Sons v. Hostetter</i> , 384 U.S. 35 (1966) ..	14
<i>King v. Smith</i> , 392 U.S. 309 (1968) ..	15
<i>Larkin v. Grendel's Den, Inc.</i> , 459 U.S. 116 (1982) ..	6, 14
<i>Lawrence County v. Lead-Deadwood School Dis- trict</i> , 105 S. Ct. 695 (1985) ..	15
<i>Massachusetts v. Mellon</i> , 262 U.S. 447 (1923) ..	17, 18
<i>National League of Cities v. Usery</i> , 426 U.S. 833 (1976) ..	17

TABLE OF AUTHORITIES—Continued

	Page
<i>New York State Liquor Authority v. Bellanca</i> , 452 U.S. 714 (1981) ..	4
<i>Oklahoma v. United States Civil Service Commis- sion</i> , 330 U.S. 127 (1947) ..	17
<i>Posadas de Puerto Rico Associates v. Tourism Com- pany of Puerto Rico</i> , 106 S. Ct. 2968 (1986) ..	12
<i>Republican College Council v. Winner</i> , 357 F. Supp. 739 (E.D. Pa. 1973) ..	12
<i>State Board of Equalization v. Young's Market Co.</i> , 299 U.S. 59 (1936) ..	7, 9, 10, 12
<i>Steward Machine Co. v. Davis</i> , 301 U.S. 548 (1937) ..	17, 18
<i>United States v. Darby</i> , 312 U.S. 100 (1941) ..	17
<i>United States v. Frankfort Distilleries</i> , 324 U.S. 293 (1945) ..	7-8
<i>United States v. Jackson</i> , 390 U.S. 570 (1968) ..	16
<i>William Jameson & Co. v. Morgenthau</i> , 307 U.S. 171 (1939) ..	7
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971) ..	14
<i>Zifrin, Inc. v. Reeves</i> , 308 U.S. 132 (1939) ..	12
<i>Constitutional Provisions and Statute</i>	
U.S. Const. amend. X ..	17
U.S. Const. amend. XXI ..	passim
23 U.S.C. § 154 ..	18
Cal. Const. art. XX, § 22 ..	12
Mich. Const. art. 4, § 40 ..	12
Mont. Const. art. II, § 14 ..	12
<i>Legislative Material</i>	
76 Cong. Rec. 4138 (1933) ..	4
76 Cong. Rec. 4147 (1933) ..	4, 12-13
130 Cong. Rec. S8207 (1984) ..	18
130 Cong. Rec. S8209 (1984) ..	16
130 Cong. Rec. S8241 (1984) ..	18
130 Cong. Rec. H5396 (1984) ..	18
130 Cong. Rec. H5397 (1984) ..	18
130 Cong. Rec. H5398 (1984) ..	16
130 Cong. Rec. H5400 (1984) ..	16

TABLE OF AUTHORITIES—Continued

<i>Miscellaneous</i>	Page
Brief for the United States as Amicus Curiae Supporting Appellants, <i>324 Liquor Corp. v. Duffy</i> , prob. juris. noted, 106 S. Ct. 1456 (1986)	6
Brief of Amici Curiae State of Vermont, State of Colorado, State of Hawaii, State of Idaho, State of Montana, State of Ohio, State of South Carolina, State of Wisconsin, and State of Wyoming, <i>South Dakota v. Dole</i> , 791 F.2d 628 (8th Cir. 1986)	18
Note, <i>The Surface Transportation Assistance Act: Federalism's Last Stand?</i> , 11 Vt. L. Rev. 203 (1986)	12, 18

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

 No. 86-260

STATE OF SOUTH DAKOTA,
Petitioner,

v.

ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION,
Respondent.

 On Petition for Writ of Certiorari to the United States
 Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE*
 NATIONAL BEER WHOLESALERS' ASSOCIATION
 IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Beer Wholesalers' Association (NBWA) is a not-for-profit corporation organized under the laws of the Commonwealth of Virginia. It was founded in 1938 to promote the general welfare of the independent distribution segment of the malt beverage industry of the United States. NBWA has over 1900 beer wholesaler members, with representation in each of the fifty states, including South Dakota. Together with NBWA associate members in the brewing, importing, and related segments

of the industry, NBWA membership accounts for over ninety percent of the malt beverages sold in the United States.

NBWA members have a vital interest in the interpretation of the Twenty-first Amendment and the appropriate allocation of regulatory authority between the States and the Federal Government with respect to malt beverages. The resolution of this case will have a direct impact on NBWA members, and the case also presents important issues concerning the Twenty-first Amendment and state-federal relations with ramifications far beyond the particular facts. This brief is filed with the consent of the parties.

ARGUMENT

I. The Twenty-first Amendment Reserves to the States the Authority to Set Minimum Drinking Ages

The Twenty-first Amendment is the only explicit grant of authority to the States in the Constitution. In many respects it is the mirror image of the Commerce Clause. Just as the Commerce Clause is an explicit grant of authority to Congress and an implicit limitation on the authority of the States, so too the Twenty-first Amendment is an explicit grant of authority to the States and an implicit limitation on the authority of Congress. The Commerce Clause does not prohibit the States from engaging in any regulatory activity that affects interstate commerce, but there is a core area in which the States may not act. By the same token, the Twenty-first Amendment does not prohibit Congress from engaging in any regulatory activity that affects alcoholic beverages, but there is a core area in which Congress may not act. Establishment of a minimum drinking age is clearly within any conception of the core powers reserved to the States by the Twenty-first Amendment.

The court below, however, seemed to regard the Amendment as neither a grant of authority to the States nor a limitation on the power of Congress. The court began its

analysis of the Twenty-first Amendment issue by stating that "we reject the state's contention that its authority to establish a minimum drinking age flows from the twenty-first amendment." App. to Pet. for Cert. ("App.") A-14. The court considered the state's authority to set the drinking age within its borders solely with reference to the general police power, with no recognition of the additional authority granted to the State by the explicit terms of the Twenty-first Amendment. The court below also assumed that "Congress's authority to legislate under the commerce clause is unaffected by the twenty-first amendment," and that "the amendment did not limit or withdraw Congress's ability to exercise authority under its existing delegated powers, including the spending power." App. A-17, A-18. In short, the court below decided the case "as if § 2 of the Twenty-First Amendment did not exist." *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166, 170 (2d Cir. 1984) (Friendly, J.), *cert. denied*, 105 S. Ct. 1393 (1985).

This Court has frequently emphasized that the Twenty-first Amendment is a significant grant of authority to the States, and that it is not merely surplusage in areas in which the States could rely upon their general police powers. "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972). In *LaRue*, the Court upheld a state prohibition on lewd entertainment in establishments that served alcoholic beverages, in light of "the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires." *Id.* at 118-119. The Court relied upon this same analysis in a more recent decision upholding a state ban on nonobscene nude

dancing in establishments licensed to sell liquor. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981). Serious questions might be raised concerning the State's authority under the police power to prohibit such dancing, but "[w]hatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment." *Id.*

The court below thus clearly erred in dismissing the significance of the Twenty-first Amendment on the ground that States could establish a minimum drinking age under the police power. Such an approach deprived South Dakota of the "added presumption" in favor of its authority to establish the minimum drinking age free of Federal interference.

The court below also erred in assuming that the authority of Congress was "unaffected" by the Twenty-first Amendment. App. A-18. This Court has stated that the Amendment "reserved to the States certain power to regulate traffic in liquor," *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) (emphasis supplied), and has frequently referred to "the powers reserved by the Twenty-first Amendment." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-276 (1984). Such a reservation of authority to the States necessarily entails a limitation on the authority of Congress.¹ When a State acts pursuant to the powers

¹ As originally proposed, the Twenty-first Amendment contained a third section providing that "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138 (1933). Senator Wagner objected to this provision, arguing that "we have expelled the system of national control through the front door * * * and readmitted it forthwith through the back door of section 3." *Id.* at 4147 (1933). The deletion of this provision prior to passage of the Amendment indicates that the Amendment, as passed, was intended as a limitation on congressional authority as well as a grant of authority to the States.

reserved to it under the Twenty-first Amendment, it does so under a direct grant of authority in the Constitution itself, and the normal operation of the Supremacy Clause does not apply.²

This is not to say that any state regulation involving alcoholic beverages automatically prevails over conflicting Federal legislation. In resolving any such conflicts this Court first considers whether the state regulation implicates interests at the core of the Twenty-first Amendment. If it does, the state regulation must prevail, since the Amendment is a constitutional limitation that Congress cannot override by mere legislation. If the state regulation does not implicate interests at the core of the Amendment, the Court will proceed to balance the competing Federal and state interests in a "pragmatic effort to harmonize state and federal powers." *Midcal*, 445 U.S. at 109.

The clearest statement of this approach is found in this Court's opinion in *Midcal*:

The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish *other* liquor regulations, *those* controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." [*Id.* at 110 (emphasis supplied) (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)).]

² See *Castlewood International Corp. v. Simon*, 596 F.2d 638, 642 (5th Cir. 1979) (Twenty-first Amendment "is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product—intoxicating liquors"), *vacated and remanded*, 446 U.S. 949, *opinion reinstated*, 626 F.2d 1200 (1980).

Balancing of Federal and state interests is appropriate only with respect to "other liquor regulations"; regulations concerning "importation or sale of liquor"—the core interests of the Twenty-first Amendment—are not subject to balancing, but are rather within the "virtually complete control" of the State.³

The decisions of this Court from the earliest days of the Twenty-first Amendment support the approach, summarized in *Midcal*, of a core area reserved for state regulation, with a balancing of Federal and state interests outside the core.⁴ The jurisprudence of the Twenty-first Amendment is often described as developing in distinct stages. According to this view, the Court recognized

³ The qualification "virtually" cannot be read to refer to any limitation imposed by legislation enacted by Congress pursuant to the commerce power or any other grant of authority. Such limitations apply only to "other liquor regulations," not those dealing directly with importation or sale. The qualification rather refers only to the explicit limitations on any exercise of state authority found in the Constitution itself, such as the First Amendment, see *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982), or the Equal Protection Clause, see *Craig v. Boren*, 429 U.S. 190, 204-209 (1976).

⁴ The United States argued below that, even in what it considered the core area of the Twenty-first Amendment, it was still necessary to balance Federal interests against those of the State. See Br. at 17. Before this Court, however, the Solicitor General in an unrelated pending case seems to take a different view, and agree with the argument that balancing is only appropriate when the state regulation is outside the core area. See Br. for the United States as Amicus Curiae Supporting Appellant at 23, *324 Liquor Corp. v. Duffy*, prob. juris. noted, 106 S. Ct. 1456 (1986). In that case, in which a New York resale price maintenance statute is alleged to conflict with the Sherman Act, the United States is careful to argue that the State's interest in protecting small retailers from lawful competition "is plainly not among the core state interests protected by the Twenty-first Amendment." That contention, whether correct or not, implicitly recognizes that if New York's interest were a core one, the balancing sought by the United States in that case would not be appropriate.

broad state power in cases decided shortly after ratification of the Amendment, altered its approach in 1964, and since that time has been increasingly receptive to claims of Federal power in the area. Such a theory, however, does not accurately describe this Court's decisions. From the earliest cases, through those decided in 1964, to the present, the Court has upheld plenary state authority in the core area of the Amendment, and balanced Federal and state interests only outside the core.

In *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62 (1936), the Court upheld a state fee on beer imports that "would obviously have been unconstitutional" prior to adoption of the Amendment. Justice Brandeis noted for the Court that the language of the Amendment was clear and conferred upon the State broad power to govern imports of alcoholic beverages. Regulation of imports is clearly at the core of the Twenty-first Amendment, and in that area the Court declined "to limit [the] broad command" of the constitutional provision. *Id.*

Less than three years later, however, the Court upheld the Federal Alcohol Administration Act, which regulated the labeling of alcoholic beverages imported into the United States, against the charge that "the Twenty-first Amendment . . . gives to the States complete and exclusive control over commerce in intoxicating liquors . . ." *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 172-173 (1939). Labeling did not implicate the core values of the Amendment, and accordingly Federal regulation in that area was permissible. From the outset, then, the Court recognized a distinction between the State's plenary power with respect to the core of the Twenty-first Amendment—importation, delivery, and sale—and continuing Federal authority outside the core.⁵

⁵ See, e.g., *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945) (Twenty-first Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons

This approach did not suddenly change on June 1, 1964, when the Court decided *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, *supra*, and *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964). The former case held that the Twenty-first Amendment did not authorize the State of New York to prevent a company from purchasing alcoholic beverages outside the State and selling them to departing international air travellers. The transactions were constantly supervised by Federal Customs officials to prevent diversion of the beverages to domestic channels. Justice Stewart's opinion for the Court began by reaffirming that the view expressed in *Young's Market* "of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned." 377 U.S. at 330. Justice Stewart went on to state that to conclude "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification." *Id.* at 331-332.

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case. [*Id.* at 332.]

These latter comments have been frequently quoted out of context as justification for restricting state authority under the Twenty-first Amendment. As Judge Friendly has noted, however, "the actual decision was the unsurprising one . . . that the Amendment did not empower New York to prohibit the sale at John F. Kennedy International Airport of tax-free liquor for 'ultimate delivery

doing an interstate liquor business outside their boundaries") (emphasis supplied).

and use . . . in a foreign country.'" *Battipaglia*, 745 F.2d at 169 (quoting *Idlewild Bon Voyage Liquor*, 377 U.S. at 333).*

Idlewild Bon Voyage Liquor thus involved state regulation of liquor purchased outside the State, destined for use outside the country, with no possibility of diversion for use within the State. The core interest of the Twenty-first Amendment in authorizing States to regulate liquor "for delivery or use" within the State was simply not implicated. The Court itself emphasized this distinction:

Here, ultimate delivery and use is not in New York, but in a foreign country. . . . As the District Court emphasized, this case does not involve "measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York." [*Id.* at 333-334 (quoting 212 F. Supp. 376, 386 (S.D.N.Y. 1962) (three-judge court)).]

The broad language of the opinion, therefore, should not be taken out of context as suggesting that *ad hoc* "balancing" is appropriate in a case, such as the present one, that *does* involve regulation of the use of alcoholic beverages within the State. As the Court itself reaffirmed, in such a case the approach of *Young's Market* "has remained unquestioned." 377 U.S. at 330.

Department of Revenue v. James B. Beam Distilling Co., *supra*, decided the same day as *Idlewild Bon Voyage Liquor*, also contains broad language that has on occasion been taken out of the very limited context in which it arose. In that case the Court held that the Twenty-first Amendment did not permit Kentucky to tax liquor imported from Scotland in violation of the Export-Import

* That there was nothing surprising about the decision is confirmed by noting that the holding was expressly predicated on *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), decided shortly after ratification of the Amendment and considered not at all inconsistent with *Young's Market*. See 377 U.S. at 332-333.

Clause. Justice Stewart, again writing for the Court, rejected the argument that "the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned." 377 U.S. at 345 (footnote omitted). Outside this limited area of a precise constitutional restriction on any state authority, however, Justice Stewart once again reaffirmed the broad power of the States under the Amendment:

We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's *plenary power* to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. [*Id.* at 346 (emphasis supplied).]

This "plenary power" under the Twenty-first Amendment is, like any Federal or state power, limited by express restrictions on its exercise found in the Constitution. In this respect, *James B. Beam* simply foreshadowed cases such as *Larkin v. Grendel's Den, Inc.*, *supra*, and *Craig v. Boren*, *supra*. This certainly does not mean, however, that the plenary power may be circumscribed in the core area by mere legislation enacted by Congress.⁷

Both *Idlewild Bon Voyage Liquor* and *James B. Beam* recognized, as this Court noted in *Midcal*, that "important federal interests in liquor matters survived the ratifi-

⁷ The principle that a State's exercise of its plenary power in the core area of the Twenty-first Amendment is limited by express provisions of the Constitution was again not a novel proposition that suddenly emerged in 1964. See *Young's Market*, 299 U.S. at 64 ("The plaintiffs insist that to sustain the exaction of the importer's license-fee would involve a declaration that the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization").

cation of the Twenty-first Amendment." 445 U.S. at 108. Neither case, however, suggested that Federal legislation could override state power in the core areas reserved to the States by the Amendment.

This Court's more recent decisions continue to recognize plenary state authority in the core area, while balancing Federal and state interests outside the core. In *Capital Cities Cable, Inc. v. Crisp*, *supra*, for example, the Court held that Federal law pre-empted a state ban on liquor advertising on cable television. The question, according to the Court, was "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." 467 U.S. at 714. Regulating advertising on interstate media was not directly related to the core powers reserved to the States—governing importation, sale, and distribution of alcoholic beverages within the State—and accordingly a balancing of the Federal and state interests was appropriate.

The Court in *Crisp* was careful to draw a distinction between state regulation in the core area and the advertising ban at issue: "In contrast to state regulations governing the conditions under which liquor may be imported or sold within the State, . . . the application of Oklahoma's advertising ban to the importation of distant signals by cable television operators engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" 467 U.S. at 715 (quoting *Midcal*, 445 U.S. at 110). The Court has thus recognized that "the conditions under which liquor may be . . . sold within the State" directly implicate "the central power reserved by § 2 of the Twenty-first Amendment."

The most basic "condition[] under which liquor may be . . . sold within the State" is of course the establishment of a minimum age for purchasers. Every State sets a drinking age, some States going so far as to establish the age in their constitutions. See, e.g., Cal. Const. art. XX, § 22; Mich. Const. art. 4, § 40; Mont. Const. art. II, § 14. Minimum drinking ages have uniformly been upheld by the courts.⁹ Indeed, it is difficult to imagine a more basic exercise of authority under the Twenty-first Amendment, apart from the decision whether to permit anyone to purchase alcoholic beverages within the State.¹⁰ It is therefore not surprising that the issue of the age at which alcoholic beverages may be purchased figured in the debates on the Amendment. Senator Wagner successfully argued against the proposal to give Congress concurrent regulatory authority under the Amendment by noting:

If Congress may regulate the sale of intoxicating liquors where they are to be drunk on premises where sold, then we shall probably see Congress attempt to declare during what hours such premises may be open, where they shall be located, how

⁹ See, e.g., *Gabree v. King*, 614 F.2d 1 (1st Cir. 1980); *Republican College Council v. Winner*, 357 F. Supp. 739 (E.D. Pa. 1973); *Houser v. State*, 85 Wash.2d 803, 540 P.2d 412 (1975).

¹⁰ See Note, *The Surface Transportation Assistance Act: Federalism's Last Stand?*, 11 Vt. L. Rev. 203, 222 (1986) ("If a state may prohibit possession of alcoholic beverages within its territory, then that state should be permitted to determine the age at which one may lawfully purchase alcohol") (footnote omitted). It is undoubted that a State may prohibit the purchase of alcoholic beverages, see *Zifrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), and "[s]urely the State may adopt a lesser degree of regulation than total prohibition." *Young's Market*, 299 U.S. at 63. Establishment of a minimum drinking age is an exercise of a lesser power included in the undisputed authority to ban alcoholic beverages altogether, and can no more be overridden by conflicting Federal provisions than could such a complete prohibition. Cf. *Puadras de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 106 S. Ct. 2968, 2978-79 (1986).

they shall be operated, the sex and age of the purchasers, the price at which the beverages are to be sold. [76 Cong. Rec. 4147 (1933) (emphasis supplied).]

A minimum drinking age thus clearly implicates "the State's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold." *Crisp*, 467 U.S. at 716. If state laws concerning who may and may not purchase alcoholic beverages are not at the core of the Twenty-first Amendment, the Amendment must have a slim core indeed.

This is not a case concerning regulation outside the State and thus beyond the core, as in *Idlewild Bon Voyage Liquor* or the more recent decision in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080 (1986).¹⁰ Nor is it a case involving peripheral interests, such as the advertising regulation at issue in *Crisp* or the promotion of local industry at issue in *Bacchus Imports, Ltd. v. Dias*, *supra*.¹¹ Finally, this is

¹⁰ In *Brown-Forman* the Court struck down a New York law affecting liquor prices in other States. As the Court noted, the Twenty-first Amendment "gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other states." 106 S. Ct. at 2088. The South Dakota regulation at issue in this case, of course, applies solely to sales in South Dakota.

¹¹ In *Bacchus* the Court struck down a state tax exemption for a locally-produced liquor. The Court, quoting from *Crisp*, framed the issue as "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." 468 U.S. at 275-276 (quoting 467 U.S. at 714). The Court's conclusion that the "central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition," 468 U.S. at 276, certainly does not detract from the statement in *Crisp* that the "central power" does include regulation of "the times, places, and manner under which liquor may be imported and sold." 467 U.S. at 716.

not a case in which state authority under the Amendment is exercised in a manner that contravenes an express limitation found elsewhere in the Constitution, as in *James B. Beam* and more recent cases such as *Larkin v. Grendel's Den, Inc.*, *supra*, *Craig v. Boren*, *supra*, or *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). No previous case has involved such a core interest under the Twenty-first Amendment as the question of the age at which liquor may be purchased within the State.

The State's plenary authority to establish a minimum drinking age is not diluted in this case simply because the Federal Government seeks to impose a higher age. The central purpose of the Amendment is not to promote temperance, but to leave such questions to the States. See *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 47 (1966) ("nothing in the Twenty-first Amendment * * * requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance"); *Battipaglia*, 745 F.2d at 178 ("Promotion of temperance is not the only interest reserved to the states by § 2 of the Twenty-First Amendment"). It would be an odd result if an Amendment passed to repeal the imposition of Federal temperance standards were interpreted as permitting Federal judges to uphold or invalidate state laws based on an assessment of whether they promote temperance. The core interest of the Twenty-first Amendment is not to promote temperance but rather to reserve to the States "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal*, 445 U.S. at 110.

II. Congress May Not Avoid the Limitations on Its Power in the Twenty-first Amendment by Proceeding under the Spending Power

The court below dismissed the significance of the Twenty-first Amendment on the ground that "no conflict exists" between South Dakota's law permitting those

over nineteen to purchase certain alcoholic beverages and the Federal statute penalizing States that permit those under twenty-one to purchase any alcoholic beverages. App. A-19. Thus the court concluded, "South Dakota is entirely free to maintain its law as it now exists and will violate no federal law if it chooses to do so." App. A-20. The question, however, is not whether South Dakota will violate Federal law, but whether the Federal law violates the Constitution. The notion that South Dakota faces "no conflict" and is "entirely free" to maintain its law, when doing so will result in its losing millions of dollars in public funds, defies common sense.

The Twenty-first Amendment is not only a broad grant of authority to the States, but necessarily—in the core area—a limitation on congressional authority as well. Congress cannot circumvent such a limitation on its power by seeking to impose a national minimum drinking age through the spending power, any more than it could by proceeding under any other grant of authority. Regardless of the source of congressional authority, the exercise of that authority is subject to the other provisions in the Constitution.

This Court has often noted that the spending clause is a broad grant of authority to Congress, but the Court has also reiterated that the authority is fully subject to other limitations in the Constitution. As the Court noted recently in *Lawrence County v. Lead-Deadwood School District*, 105 S. Ct. 695, 703 (1985), "Congress may impose conditions on the receipt of federal funds, *absent some independent constitutional bar*" (emphasis supplied). See *King v. Smith*, 392 U.S. 309, 333 n.34 (1968) (conditions may be imposed "unless barred by some controlling constitutional prohibition"); cf. *Buckley v. Valeo*, 424 U.S. 1, 91 (1976). The Twenty-first Amendment bars Congress from imposing a national minimum drinking age on the States, and Congress cannot avoid this

"independent constitutional bar" by proceeding under its spending powers.

Under the Amendment, South Dakota has the constitutional right to set a minimum drinking age, free from Federal interference. The sole purpose of the challenged Federal statute is to interfere with South Dakota's exercise of that right and compel South Dakota to change its minimum drinking age. As the primary sponsor of the legislation frankly stated, "It is time to use the stick * * *." 130 Cong. Rec. S8209 (daily ed. June 26, 1984) (Sen. Lautenberg).¹² This Court held in *United States v. Jackson*, 390 U.S. 570, 581 (1968), that a law with "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them * * * [is] patently unconstitutional." Congress is not free to induce States to surrender their authority under the Constitution as a condition of receipt of Federal funds.

It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence. [*Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593-594 (1926).]

¹² See also 130 Cong. Rec. H5398 (daily ed. June 7, 1984) ("I think it will send the necessary message to the State legislatures") (Rep. Lent); *id.* at H5400 ("This is just the first step on our part, and further steps will be forthcoming if there is not an adequate response") (Rep. Levin).

Nothing in *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947), is to the contrary. In that case the Court upheld a Federal grant condition limiting the political activities of certain state officials, even though Congress did not have the authority to regulate those activities directly. The only bar to the condition asserted in that case, however, was the Tenth Amendment, which the Court noted was not interpreted (at that time) as a limitation on congressional authority.¹³ *Oklahoma*, therefore, provides no support for the proposition that Congress may circumvent a limitation on its authority—as opposed to a mere lack of authority—through the spending power. As noted, in the core area of the Twenty-first Amendment, the Amendment is a limitation on the power of Congress.

The court below stated that "South Dakota is entirely free to reject Congress's offer of federal highway funds and exercise in any way it chooses its authority to establish a minimum drinking age." App. A-23. *Amicus* recognizes that this Court, like the court below, has stated the broad proposition that a condition on the grant of Federal funds does not deny rights to the States, because the States may decline the funds. See *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923); *Steward Machine Co. v. Davis*, 301 U.S. 548, 593-598 (1937). As noted, this proposition is not applicable when, as here, the condition contravenes an independent

¹³ The Court quoted *United States v. Darby*, 312 U.S. 100, 124 (1941), for the proposition that "the Tenth Amendment has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.'" 330 U.S. at 143. This view of the Tenth Amendment changed with the decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), but was revived with the overruling of that decision in *Garcia v. San Antonio Metropolitan Transportation Authority*, 105 S. Ct. 1005 (1985). At the time *Oklahoma* was decided, as now, the Tenth Amendment was not a limitation on congressional authority.

limitation on congressional authority. In addition, while the proposition in its most general terms may have been valid when first announced, it requires reexamination in light of present-day realities. Federal spending practices and state budgets have changed dramatically in the half century since *Mellon and Steward Machine Co.*, and today many if not all States are no longer "entirely free" to turn down funds absolutely essential to their economies.¹⁴ Congress knows this to be true.¹⁵ The States know it to be true.¹⁶ This Court need not be blind to the realities that shape the conduct of the other actors in the constitutional scheme, and need not characterize conditions on the receipt of Federal funds as "coercive" before recognizing that a State may well be forced to

¹⁴ See Note, *The Surface Transportation Assistance Act: Federalism's Last Stand?*, 11 Vt. L. Rev. 203, 212-213 (1986) ("Most states can ill afford to lose federal dollars and, therefore, are literally forced into compliance in order to receive the federal benefits") (emphasis in original).

¹⁵ The debates leave little doubt that Congress viewed the threatened withholding of Federal funds as sufficient to establish a national minimum drinking age. See 130 Cong. Rec. S8207 (daily ed. June 26, 1984) ("the time has come for Congress to take action so that we will have a nationwide drinking age of 21") (Sen. Danforth); *id.* at S8241 ("we need a uniform national drinking age, and we need congressional action to that end") (Sen. Huddleston); 130 Cong. Rec. H5396 (daily ed. June 7, 1984) ("It is about time that we do have uniformity in this country and that we do have an age that is recognized nationally as the proper age at which alcohol consumption is legal") (Rep. Shaw); *id.* at H5397 ("Federal action is needed to establish a uniform nationwide drinking age of 21") (Rep. Florio).

Congress increasingly resorts to the expedient of imposing conditions on the receipt of Federal funds. See, e.g., 23 U.S.C. § 154 (national maximum speed limit). Both the Federal spending and the conditions were, of course, relatively rare fifty years ago.

¹⁶ See Brief of Amici Curiae State of Vermont, State of Colorado, State of Hawaii, State of Idaho, State of Montana, State of Ohio, State of South Carolina, State of Wisconsin, and State of Wyoming, *South Dakota v. Dole*, 791 F.2d 628 (8th Cir. 1986).

forfeit constitutional prerogatives—such as the right to establish within its own borders the age at which its citizens may purchase and possess alcoholic beverages—to comply with a Federal mandate.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

86-260

(3)

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No.

**In the Supreme Court
of the United States**

OCTOBER TERM, 1986

THE STATE OF SOUTH DAKOTA,
Petitioner,

v.

THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
IN HER OFFICIAL CAPACITY,
Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE FOR THE STATES OF
COLORADO, HAWAII, LOUISIANA, MONTANA, OHIO,
SOUTH CAROLINA, VERMONT AND WYOMING

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Questions Presented for Review	1
Opinion Below	2
Interest of Amici Curiae	2
Constitutional and Statutory Provisions Involved	3
 Argument	
I. THE TWENTY-FIRST AMENDMENT ACTS AS AN INDEPENDENT CONSTITUTIONAL BAR TO THE SPENDING CLAUSE	4
II. SINCE THE COURT USED AN INCORRECT ANALYSIS STATE INTERESTS WERE NOT ADEQUATELY CONSIDERED	6
III. THERE IS A REAL CONFLICT BETWEEN THE FEDERAL AND STATE LAWS	7
Conclusion	9
 Appendices	

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page No.</i>
<i>California Liquor Dealers v. Mitcal</i> , 445 U.S. 97 (1980)	5
<i>California v. Robert LaRue</i> , 409 U.S. 109, 34 L.Ed.2d 342 (1972)	5
<i>Capitol Cities Cable v. Crisp</i> , 467 U.S. 691, 81 L.Ed.2d 480 (1984)	5
<i>Fullilove v. Klutznick</i> , 448 U.S. 448, 65 L.Ed.2d 909 (1980)	4
<i>Lawrence Co. v. Lead-Deadwood School</i> , — U.S. —, 83 L.Ed.2d 635 (1985)	4
<i>Oklahoma v. U.S. Civil Service Comm'n</i> , 330 U.S. 127, 91 L.Ed. 794 (1947)	4
<i>Pennhurst State School v. Halderman</i> , 451 U.S. 1, 67 L.Ed.2d 694 (1981)	4
<i>State of South Dakota v. Dole</i> , 791 F.2d 628, (8th Cir. 1986)	4
OTHER AUTHORITY	
Act 117, 1985 Acts and Joint Resolutions of the General Assembly of the State of South Carolina, Section 4	8
F.R.C.P. Rule 12 (b)	6
Surface Transportation Assistance Act of 1982	2
Wyoming State Tribune, September 2, 1986	8

No.

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BRIEF AMICI CURIAE FOR THE STATES OF
COLORADO, HAWAII, LOUISIANA, MONTANA, OHIO,
SOUTH CAROLINA, VERMONT AND WYOMING

QUESTIONS PRESENTED FOR REVIEW

I

DOES 23 U.S.C. § 158, THE NATIONAL MINIMUM DRINK-
ING AGE, AS AMENDED THROUGH APRIL 7, 1986,
UNCONSTITUTIONALLY DISPLACE THE STATE'S
CORE POWER, UNDER THE TWENTY-FIRST AMEND-
MENT, UNITED STATES CONSTITUTION, TO SET MINI-
MUM DRINKING AGES?

II

DOES 23 U.S.C. § 158, THE NATIONAL MINIMUM DRINKING AGE, VIOLATE THE TENTH AMENDMENT, UNITED STATES CONSTITUTION, BY DISPLACING THE STATE'S CORE POWER TO SET DRINKING AGES, GRANTED TO THE STATE BY THE TWENTY-FIRST AMENDMENT?

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in *State of South Dakota v. Dole* is reported at 791 F.2d 628 and appears in the Appendix of Petitioner's brief.

INTEREST OF THE AMICI CURIAE

Some states filing *Amicus Curiae* permit the consumption of alcoholic beverages by persons under the age of 21. Others had statutes allowing persons under the age of 21 to consume alcoholic beverages, but modified those statutes pursuant to the terms of the Surface Transportation Assistance Act of 1982 (STAA). The legislatures of all *amici* have considered bills to raise drinking ages in their jurisdictions. The states conforming with the federal government's minimum age will receive a full entitlement of highway monies. Those states which resist federal coercion will be denied a portion of their highway fund entitlement. The *amici* take no position on what an appropriate drinking age should be, however they believe that the federal government is impermissibly penalizing states for exercising constitutional rights reserved to the states by the Twenty-First Amendment.

The states which still allow persons under the age of 21 to legally consume alcoholic beverages are threatened with

the denial of a portion of their federal highway funds. (Appendix A lists estimates of the highway funds which will be withheld in years 1987 and 1988 if STAA is upheld.) Acquiescence in the federal government's judgment of an appropriate drinking age is contrary to the state's authority under the Twenty-First Amendment and is in direct contravention of the reasoned and balanced decisions made by the individual states.

This case would be an important vehicle for clarifying the limits of the spending clause vis-a-vis the Twenty-First Amendment and the Tenth Amendment, in particular as to how these provisions relate to the denial of highway funds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions which are involved in this case are listed in the Petitioner's brief, page 2 through 7.

REASONS FOR GRANTING THE WRIT

ARGUMENT

Introduction.

South Dakota has argued that the holding of the Eighth Circuit conflicts with applicable decisions by other jurisdictions; that state and federal interest conflict in this state; and that the balance must be struck in favor of the state. *Amici* agree with South Dakota's reasoning and adopts those positions as a basis for this brief. The states believe, however, that an expansion of the arguments concerning the applicability of the Twenty-First Amendment and the proper use of the United States Supreme Court's balancing tests would be helpful in deciding the issues. Reasons for granting the Writ of Certiorari are as follows:

I. THE TWENTY-FIRST AMENDMENT ACTS AS AN INDEPENDENT CONSTITUTIONAL BAR TO THE SPENDING CLAUSE.

The Court of Appeals for the Eighth Circuit held that Congress had authority under the spending clause to attach conditions to the expenditure of federal funds. The requirements which the Congress must meet are that the legislation 1) must further the well-being of a particular region or locality; 2) must be reasonably related to the national interest which Congress seeks to advance; and 3) must not violate an independent constitutional bar. The United States Supreme Court has repeatedly allowed the payment of federal money to be conditional in order to induce voluntary cooperation with federal policy. *Fullilove v. Klutznick* 448 U.S. 448, 65 L.Ed.2d 909 (1980). Withholding highway funds to coerce state compliance began as early as 1947. *Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127, 91 L.Ed. 794 (1947). The amici recognize that Congress, under appropriate circumstances, may fix the terms on which it disperses federal money to the states. *Pennhurst State School v. Halderman*, 451 U.S. 1, 67 L.Ed.2d 694 (1981). The states, however, contend that the Twenty-First Amendment creates an independent constitutional bar which in this situation invalidates use of this power. See *Lawrence Co. v. Lead-Deadwood School*, ___ U.S. ___, 83 L.Ed.2d 635 (1985).

The Eighth Circuit did not adequately address the ~~connection~~ between the spending clause and the Twenty-First Amendment because it rejected South Dakota's contention that "... authority to establish a minimum drinking age flows from the twenty first amendment." *State of South Dakota v. Dole*, 791 F.2d 628, 632 (8th Cir. 1986). Because the court construed the Twenty-First Amendment as merely being an exception to the commerce clause, it held that the state's authority to establish a minimum drinking age came from its general police power. The proper balance of the

interest of states' government against the interests of the federal government was not established. In *California v. Robert LaRue*, 409 U.S. 109, 34 L.Ed.2d 342 (1972), this Court held that any consideration of state laws regulating intoxicating liquors begins with a consideration of the Twenty-First Amendment. Further, this Court recognized that the Twenty-First Amendment granted more authority to the states over the public health, welfare and morals of its citizens than do the provisions of the Constitution making general grants of authority. The analysis of the Eighth Circuit is simply not in accord with the United States Supreme Court's decisions.

A close analysis of two recent Supreme Court cases would be helpful. *California Liquor Dealers v. Mital*, 445 U.S. 97 (1980) contains a comprehensive history of cases concerning the competing constitutional provisions involving the Twenty-First Amendment. The Court held that the terms 'transportation or importation' logically entails considerable regulatory powers and is not strictly limited to the terms of the Amendment. The early decisions of the Court recognize the great powers of each state. Subsequent decisions have also emphasized that important federal interests survived ratification. The Court stated that: "The Twenty-First Amendment grants the states virtually complete control over whether to permit importation or sale of liquors and how to structure the liquor distribution system." (Emphasis added). 445 U.S. at 110.

Capitol Cities Cable v. Crisp, 467 U.S. 691, 81 L.Ed.2d 480 (1984), is a recent case which balanced state and federal interests in relation to the Twenty-First Amendment. The Court analyzed the preemption regulations of the Federal Communication Commission and concluded that if the preemption was within its authority, then all conflicting state regulations were precluded. Normally their analysis would end at that point, but since the Twenty-First Amendment was involved, the Court continued its analysis by

looking at the interests of the state. The decision weighed in favor of the federal government because the restrictions of the state did not show an attempt to directly regulate the sale or use of alcohol within its borders. The state's use of a selective approach indicated a limited state involvement.

The importance of the Eighth Circuit's refusal to consider the Twenty-First Amendment in the present case is that its analysis did not go as far as it should. Once the court found that the federal interest was appropriate, it discontinued further analysis. It did not look at competing state interests. It did not consider that although the federal interest was rational, the state's interest was comprehensive, well-reasoned and uniquely suited to its citizens. By ignoring the relevancy of the Twenty-First Amendment, it did not adequately consider the question of whether the Twenty-First Amendment was an independent constitutional bar to the spending clause. If the effect of the Twenty-First Amendment had been properly analyzed under the Supreme Court cases, the result would have been different. The court ignored the Supreme Court's holding that the regulatory powers over alcohol are broader than the terms of the Amendment. The Writ of Certiorari should therefore be granted in order to apply the proper balancing test.

II. SINCE THE COURT USED AN INCORRECT ANALYSIS STATE INTERESTS WERE NOT ADEQUATELY CONSIDERED.

Even though this case was initially dismissed because of a procedural bar, i.e., a F.R.C.P. Rule 12(b) motion for failure to state a cause of action for which relief can be granted, the court of appeals partially based its opinion upon the congressional debate concerning young adults who drink and drive. Since the court's analysis did not balance states' interests, it gave no weight to the individual states in addressing the problem. All of the states have significant and

substantial laws relating to driving while under the influence of intoxicating liquors (DUI statutes). The states have focused on severe penalties for drinking and driving, and educational programs, as well as on the age at which one drinks. The federal concern is only with the minimum age at which one may legally drink. The state schemes are more encompassing and more reasonably related to the problem of drunk driving. The states are concerned with drunk driving at any age.

The states' interests in supervising their young adults are valid and well-reasoned. Wyoming enacted the minimum drinking age of 19 after a careful consideration of the other rights, responsibilities and duties of its citizens. American citizens are allowed to vote at the age of 18, and to exercise many other rights of citizenship. They can be drafted at age 18. Wyoming had determined that since a person has the responsibilities of defending his country and electing its government, that person ought to enjoy the other rights of adulthood. In Wyoming and many other states a 19 year old is qualified to be a guardian of minors, a trustee with property, to own property, to be licensed for occupations, and to sign and be bound by contracts. It is wholly consistent and reasonable to allow a citizen the additional indicia of adulthood - i.e., access to alcoholic beverages. No one at any age in Wyoming is allowed to voluntarily drink and then legally drive. The states' approach to the problem of drunk driving is more substantial than the approach of the federal government.

III. THERE IS A REAL CONFLICT BETWEEN THE FEDERAL AND STATE LAWS.

The Eighth Circuit held that regardless of any balancing tests there is not a conflict between the statute and STAA because South Dakota is free to adopt any drinking age. This analysis is not realistic. Millions of dollars in highway funds

which are indispensable to state maintenance of highways are involved. It is disingenuous to believe that a state is free to determine a different drinking age. According to the Wyoming State Tribune, September 2, 1986, five more states have recently raised their drinking age to 21; Iowa, Wisconsin, Minnesota, Texas and North Carolina. Forty-one states now have a minimum drinking age of 21, many in response to the federal government's coercion. A determination that a state is free to set its own minimum drinking age is not based on the realities of the states' troubled economic conditions.

South Carolina enacted legislation raising the drinking age to 21 effective September 14, 1986. The reluctance of the South Carolina General Assembly is evident from the following provision of the enactment dealing with 23 U.S.C. § 158:

SECTION 4. If Public Law 98-363 is enjoined by a court of competent jurisdiction or declared by a court to be contrary to the United States Constitution, the provisions of Section 61-9-40, 61-9-455, and 20-7-370 of the 1976 Code shall be effective under the terms and conditions as existed prior to the amendments in Sections 1, 2, and 3.

Act 117, 1985 Acts and Joint Resolutions of the General Assembly of the State of South Carolina, § 4 (Appendix B). This provision would lower South Carolina's drinking age in the event that STAA is invalidated. The South Carolina General Assembly also passed a Resolution requesting its Attorney General to file an *amicus curiae* brief in support of the State of South Dakota in the present action. (Appendix C.)

The Vermont legislature originally declined to raise the drinking age in 1985, but has recently reconsidered and enacted a drinking age of 21 years. An earlier joint resolution enunciates that the legislative debate of the drinking age was

substantially influenced by the provisions of STAA. (Appendix D.) The reaction of the states shows that they are unable to exercise a free choice in the face of such federal spending conditions.

CONCLUSION

The decision in *South Dakota v. Dole* has alarming ramifications for all states. If the Twenty-First Amendment can be construed as only limiting the commerce clause then the states' individual plans for alcohol consumption are subject to total control by the federal government. The states are in a unique position to know which regulations and controls are most appropriate within their own boundaries. The time that a drinking establishment may be open or the days; the requirements of serving food or not, as well as any other requirement and control, would all be subject to federal coercion. The Twenty-First Amendment does not allow this federal interference. A Writ of Certiorari should be granted to resolve this problem.

Respectfully submitted,

A.G. McCLINTOCK
Attorney General
State of Wyoming

KAREN A. BYRNE
Assistant Attorney General

A-1

APPENDIX A

ESTIMATED LOSSES OF HIGHWAY FUNDS
OCCASIONED BY 23 U.S.C. 158
(in millions of dollars)

	FY 87	FY 88
Hawaii	\$5.9 M	\$11.8 M
Idaho	4.5	8.7
Ohio	16.5	33.1
Vermont	2.6	5.3
Wisconsin	7.2	14.3
Wyoming	4.5	9.0

B-1

APPENDIX B

STATUTES AT LARGE OF SOUTH CAROLINA
General and Permanent Laws - 1985

No. 117

(R171, H2261)

AN ACT TO AMEND SECTIONS 61-9-40, AS AMENDED, 61-9-455, AND 20-7-370, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO BEER AND WINE, SO AS TO PROVIDE THAT THE SALE OF BEER AND WINE TO PERSONS UNDER THE AGE OF TWENTY-ONE AND THE PURCHASE OR POSSESSION OF THE BEVERAGES BY A PERSON UNDER THE AGE OF TWENTY-ONE IS UNLAWFUL; AND TO PROVIDE THAT SIGNS IN RETAIL LOCATIONS MUST BE POSTED STATING THAT PURCHASE OF BEER AND WINE BY PERSONS UNDER TWENTY-ONE YEARS OF AGE IS UNLAWFUL.

Be it enacted by the General Assembly of the State of South Carolina:

Penalty

SECTION 1. Section 61-9-40 of the 1976 Code, as last amended by Act 414 of 1984, is amended to read:

"Section 61-9-40. It is unlawful for any person to sell beer, ale, porter, wine, or any other similar malt or fermented beverage to a person under the age of twenty-one. Any person making such unlawful sale must be upon conviction fined not less than one hundred dollars nor more than two hundred dollars or imprisoned not less than thirty days nor more than sixty days, or both, in the discretion of the court."

Permit to be posted

B-2

SECTION 2. Section 61-9-455 of the 1976 Code, added by Act 414 of 1984, is amended to read:

"Section 61-9-455. Every person engaged in the business of selling at retail beer, ale, porter, or wine shall post in every location for which he has obtained a permit pursuant to Section 61-9-310 a sign with the following words printed thereon: 'Any purchase of beer, ale, porter, or wine in this establishment by anyone under twenty-one years of age is a violation of the laws of this State and may be punished accordingly.' The Alcoholic Beverage Control Commission shall by regulation prescribe the size of the lettering and the location of the sign on the seller's premises.

Any retail seller of beer, ale, porter, or wine who fails to display this section is guilty of a misdemeanor and upon conviction must be fined not more than one hundred dollars or imprisoned for not more than thirty days."

Penalty

SECTION 3. Section 20-7-370 of the 1976 Code, as last amended by Act 506 of 1984, is further amended to read:

"Section 20-7-370. It is unlawful for any person under the age of twenty-one to purchase, or knowingly have in his possession, any beer, ale, porter, wine, or any other similar malt or fermented beverage. Any such possession is prima facie evidence that it was knowingly possessed. Any person violating the provisions of this section is guilty of a misdemeanor and upon conviction must be fined not less than twenty-five dollars nor more than one hundred dollars.

This section does not apply to any employee lawfully engaged in the sale or delivery of any such beverage in an unopened container.

Persons eighteen years of age and over lawfully employed to serve or remove beer, wine, or alcoholic beverages

B-3

in establishments licensed to sell such beverages are not considered to be in unlawful possession of the beverages during the course and scope of their duties as an employee. The provisions of this paragraph shall in no way affect the requirement that a bartender must be at least twenty-five years of age."

Effect of code sections is declared unconstitutional

SECTION 4. If Public Law 98-363 is enjoined by a court of competent jurisdiction or declared by a court to be contrary to the United States Constitution, the provisions of sections 61-9-40, 61-9-455, and 20-7-370 of the 1976 Code shall be effective under the terms and conditions as existed prior to the amendments contained in Sections 1, 2, and 3.

Time effective

SECTION 5. This act shall take effect September 14, 1986.

Approved the 24th day of May, 1985.

C-1

APPENDIX C

INTRODUCED

March 19, 1985

S. 364

Introduced by SENATORS Pope and Powell

S. Printed 3/19/85—S.

Read the first time March 19, 1985.

A CONCURRENT RESOLUTION

TO REQUEST THE ATTORNEY GENERAL OF SOUTH CAROLINA TO FILE AN AMICUS CURIAE BRIEF SUPPORTING THE POSITION OF THE STATE OF SOUTH DAKOTA IN THE CASE OF *SOUTH DAKOTA V. DOLE* CONCERNING THE FEDERAL MANDATE TO STATES TO RAISE THE DRINKING AGE TO TWENTY-ONE YEARS OF AGE IN ORDER TO PREVENT THE FORFEITURE OF FEDERAL HIGHWAY FUNDS.

Whereas, the members of the General Assembly believe it is the duty of the State of South Carolina to participate where possible in those federal cases which have a significant impact upon the states in general and the State of South Carolina in particular; and

Whereas, the case of *South Dakota v. Dole* where the Congress has required the states to raise the drinking age to twenty-one years of age or lose federal highway funds is such a case. Now, therefore;

Be it resolved by the Senate, the House of Representatives concurring:

That the members of the General Assembly hereby request the Attorney General of South Carolina to file an Amicus Curiae brief supporting the position of the State of South Dakota with Judge Andrew W. Bogue in the case of *South Dakota v. Dole*, Docket No. CIV. 84-5137, concerning the federal mandate to states to raise the drinking age to twenty-one years of age in order to prevent the forfeiture of federal highway funds.

Be it further resolved that a copy of this resolution be forwarded to the Attorney General.

APPENDIX D

NO. R-69. JOINT RESOLUTION RELATING TO FEDERAL LEGISLATION ON THE DRINKING AGE.

(J.R.H. 16)

Offered by: Representatives Harris of Windsor and Spater of Chester.

WHEREAS, The President of the United States has proposed and the Congress has enacted a "National Minimum Drinking Age" of 21 years (23 U.S.C. § 158); and

WHEREAS, under the federal legislation, the Secretary of Transportation of the United States must withhold a significant portion of federal highway funds from each state beginning October 1, 1986 unless said state has adopted a minimum drinking age of 21 years, and

WHEREAS, the Twenty-First Amendment of the United States Constitution preserves exclusively for the states the power to regulate the sale of intoxicating liquors within their borders, and

WHEREAS, the United States Constitution does not grant to the federal government the specific power to establish a drinking age and all powers not given to the United States Government are reserved to the states, and

WHEREAS, the Vermont Legislature has during the present term debated the bill to raise Vermont's minimum drinking age to 21, and said debate has been substantially affected by the presence of the federal legislation, particularly among those Senators and Representatives who are concerned about the threatened loss of federal funds or who resent the interference by Congress in a manner which is a

state prerogative, and

WHEREAS, the State of South Dakota is currently challenging the constitutionality of the federal law, now therefore be it

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES:

That the General Assembly expresses on behalf of the people of the State of Vermont its outrage and opposition to very intrusive actions by the federal government on the drinking age, and be it further

RESOLVED: That the Attorney General of the State of Vermont be directed to join suit with South Dakota in challenging this law, and be it further

RESOLVED: That the Secretary of State be directed to send a copy of this resolution to the Vermont Congressional Delegation with a request that the delegation seek the repeal of the "National Minimum Drinking Age" as soon as possible, and be it further

RESOLVED: That the General Assembly requests the Congressional Delegation to convey the resolution and the request for repeal of the "National Minimum Drinking Age" to the President of the United States.

PETITIONER'S BRIEF

8
NO. 86-260

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE STATE OF SOUTH DAKOTA,

Petitioner,

v.

THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
IN HER OFFICIAL CAPACITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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January, 1987

8-1 P/D

Supreme Court, U.S.

FILED

JAN 22 1987

JOSEPH F. SPANGLER, JR.
CLERK

QUESTIONS PRESENTED FOR REVIEW

I

DOES 23 U.S.C. §158, THE NATIONAL MINIMUM DRINKING AGE, AS AMENDED THROUGH APRIL 7, 1986, UNCONSTITUTIONALLY DISPLACE THE STATE'S CORE POWER, UNDER THE TWENTY-FIRST AMENDMENT, UNITED STATES CONSTITUTION, TO SET MINIMUM DRINKING AGES?

II

DOES 23 U.S.C. §158, THE NATIONAL MINIMUM DRINKING AGE, VIOLATE THE TENTH AMENDMENT, UNITED STATES CONSTITUTION, BY DISPLACING THE STATE'S CORE POWER TO SET DRINKING AGES, GRANTED TO THE STATE BY THE TWENTY-FIRST AMENDMENT?

PARTIES TO THE PROCEEDINGS

Petitioner, the State of South Dakota, has been a party to this litigation from the beginning. Petitioner will be referred to as "the State." Respondent, the Honorable Elizabeth H. Dole, Secretary of the United States Department of Transportation, has also been a party to this litigation from the beginning. She will be referred to as "the Secretary" or "Secretary Dole."

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	x
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
SUMMARY ARGUMENT	14
ARGUMENT	
I. 23 U.S.C. §158, THE NATIONAL MINIMUM DRINKING AGE, AS AMENDED THROUGH APRIL 7, 1986, UNCONSTITUTIONALLY DISPLACES THE STATE'S CORE POWER, UNDER THE TWENTY-FIRST AMENDMENT, TO SET MINIMUM DRINKING AGES.	23
II. THE NATIONAL MINIMUM DRINKING AGE, 23 U.S.C. §158, VIOLATES THE TENTH AMENDMENT, BY DISPLACING THE STATE'S CORE POWER TO SET DRINKING AGES, GRANTED TO THE STATE BY THE TWENTY-FIRST AMENDMENT.	63
CONCLUSION	71
	iii

TABLE OF AUTHORITIES

	PAGE
<u>Bacchus Imports, Ltd. v. Dias,</u> 468 U.S. 263, 274-276 (1984)	PASSIM
<u>Bose Corporation v. Consumer's</u> <u>Union of the United States,</u> 466 S.Ct. 485, 501, <u>reh'g denied,</u> 467 U.S. 1267 (1984)	25
<u>Brown-Forman Distillers</u> <u>Corporation v. New York State</u> <u>Liquor Authority,</u> 106 S.Ct. 2080 2087-88 (1986)	15, 29, 41
<u>California v. LaRue,</u> 409 U.S. 109, 114 (1972)	28, 41
<u>California Retail Liquor</u> <u>Dealers Assn. v. Midcal Aluminum,</u> <u>Inc.,</u> 445 U.S. 97 (1980)	PASSIM
<u>Capital Cities Cable Inc. v. Crisp,</u> 467 U.S. 691, 712-715 (1984)	30, 32, 40, 58
<u>City of Newport, Kentucky v.</u> <u>Iacobucci,</u> 107 S.Ct. 383 (1986)	PASSIM
<u>City of Rome v. United States,</u> 446 U.S. 156, 201, n. 12 (1980)	35
<u>Clark Distilling Company v.</u> <u>Western Maryland Railway,</u> 242 U.S. 311 (1917)	25

<u>Conley v. Gibson</u> , 355 U.S. 41, 45-46 (1957)	23
<u>Craig v. Boren</u> , 429 U.S. 190, 206 (1976)	30, 32
<u>Doran v. Salem Inn, Inc.</u> , 422 U.S. 922 (1975)	29
<u>Federal Energy Regulatory Commission v. Mississippi</u> , 456 U.S. 742, 789-790 (1982)	35, 36
<u>Garcia v. San Antonio Metropolitan Transit Authority</u> , 469 U.S. 528, <u>reh'g denied</u> , 471 U.S. 1040 (1985)	PASSIM
<u>Harris v. McCray</u> , 448 U.S. 297, n. 19 at 317, <u>reh'g denied</u> , 448 U.S. 917 (1980)	56
<u>Hostetter v. Idlewild Bon Voyage Liquor Corp.</u> , 377 U.S. 324 (1964)	58
<u>Jenkins v. McKeithen</u> , 395 U.S. 411, 421-422 (1969)	24
<u>Joseph S. Finch and Company v. McKittrick</u> , 305 U.S. 395 (1939)	29
<u>Larkin v. Grendel's Den, Inc.</u> , 459 U.S. 116 (1982)	31, 32
<u>Lawrence County v. Lead-Deadwood School District No. 40-1</u> , 469 U.S. 256, 269-270 (1985)	50, 51, 53

<u>Maryland v. Wirtz</u> , 392 U.S. 183 (1968)	35
<u>Mahoney v. Joseph Triner Corporation</u> , 304 U.S. 401 (1938)	29
<u>National League of Cities v. Usery</u> , 426 U.S. 833 (1976)	35
<u>New State Ice Company v. Liebmann</u> , 285 U.S. 262, 311 (1932)	36, 68
<u>New York State Liquor Authority v. Ballanca</u> , 452 U.S. 714 (1981)	29, 41
<u>North Carolina v. Pearce</u> , 395 U.S. 711 (1969)	56
<u>Oklahoma v. United States Civil Service Commission</u> , 330 U.S. 127 (1947)	19, 20, 50
<u>Rhodes v. Iowa</u> , 170 U.S. 412 (1898)	25
<u>In Re Rahrer</u> , 140 U.S. 545 (1891)	25
<u>San Antonio Independent School District v. Rodriguez</u> , 411 U.S. 1, 50 (1973)	36
<u>Scott v. Donald</u> , 165 U.S. 58 (1897)	25
<u>Sherbert v. Verner</u> , 374 U.S. 398 (1963)	21, 55
<u>State of South Dakota v. Dole</u> , 791 F.2d 628, 633-634 (8th Cir. 1986)	49

Steward Machine Company v.
Davis, 301 U.S. 548 (1937) 50, 66

State Board of Equalization v.
Youngs Market Company, 299 U.S.
 59 (1936) 29

Tinker v. Des Moines Community
School District, 393 U.S. 503,
 n.2 at 506 (1969) 56

324 Liquor Corp. v. Duffy,
 55 U.S.L.W. 4094, 4098 (1987) PASSIM

United States v. Butler, 297
 U.S. 1 (1936) 50, 60

Younger v. Harris,
 401 U.S. 37 (1971) 37

STATUTORY REFERENCES:

Pub.L. 98-363, §6, 98 Stat. 435,
 437-438 7

Pub.L. 99-272, Tit. IV, §4101 8

S.D. Cod. L. Ann. 35-2 45

S.D. Cod. L. Ann. 35-4 45

S.D. Cod. L. Ann. 35-4-10 45

S.D. Cod. L. Ann. 35-4-11.1 45

S.D. Cod. L. Ann. 35-4-78 11, 44

S.D. Cod. L. Ann. 35-6-27 11, 44

United States Code

23 U.S.C. §104(b)(1) 9

23 U.S.C. §104(b)(2) 9

23 U.S.C. §104(b)(5)(A) 8

23 U.S.C. §104(b)(5)(B) 9

23 U.S.C. §104(b)(6) 9

23 U.S.C. 158 PASSIM

23 U.S.C. §158(b)(1)(A)(i) 9

23 U.S.C. §158(b)(1)(B) 10

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 13

28 U.S.C. §1331 10

28 U.S.C. §2201, 2202 10

OTHER REFERENCES:

U.S. Const., Art. I, §8, cl. 1 2, 33

U.S. Const., Art. I, §8, cl. 2 2

U.S. Const., amend. 10 2, 16, 17

U.S. Const., amend. 21, sec. 2 3

Federal Rules of Civil Procedure, Rule 12(b)(1)	23
Federal Rules of Civil Procedure, Rule 12(b)(6)	PASSIM
Federal Rules of Civil Procedure, Rule 52(a)	25
76 Cong.Rec. 4146	26, 27
76 Cong.Rec. 4147	28, 43, 69
76 Cong.Rec. 4168	27
76 Cong.Rec. 4229 (1933)	26
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in State of South Dakota v. Dole, is reported at 791 F.2d 628, and appears in the Appendix to the Petition for Certiorari (hereinafter PA plus page number). (PA-2) The judgment of the Court of Appeals, dated and filed May 21, 1986, also appears in the same Appendix. (PA-39) The opinion of the United States District Court for the District of South Dakota, Western Division, is unreported. A copy appears in the Appendix (PA-24), as does a copy of the District Court's judgment. (PA-40)

NO. 86-260

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

THE STATE OF SOUTH DAKOTA,
Petitioner,

v.

THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
IN HER OFFICIAL CAPACITY,

Respondent.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was dated and entered May 21, 1986. The State's Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). This Court granted the Petition for Certiorari on

December 1, 1986. Petitioner's time for filing its Brief on the Merits was extended to January 22, 1987, by letter of the Clerk dated January 5, 1987.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

1. United States Constitution, Article I, Section 8, Clause 1:

§8. The Congress shall have power:

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

2. United States Constitution, Article I, Section 8, Clause 2:

§8. The Congress shall have power:

. . . .

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

3. United States Constitution, Amendment 10:

The powers not delegated to the United States by the Constitution,

nor prohibited by it to the states, are reserved to the states respectively, or to the people.

4. United States Constitution, Amendment 21, Section 2:

§2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

5. 23 U.S.C. §158, National Minimum Drinking Age, as amended through April 7, 1986:

§158. National minimum drinking age

(a) Withholding of funds for noncompliance.--

(1) First year.--The Secretary shall withhold 5 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(2), 104(b)(5), and 104(b)(6) of this title on the first day of the fiscal year succeeding the first fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

(2) After the first year.--The Secretary shall withhold 10 per centum of the amount required to be apportioned to any State under each of section 104(b)(1), 104(b)(2), 104(b)(5) and 104(b)(6) of this title on the first day

of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

(3) State grandfather law as complying.--If, before the later of (A) October 1, 1986, or (B) the tenth day following the last day of the first session the legislature of a State convenes after the date of the enactment of this paragraph, such State has in effect a law which makes unlawful the purchase and public possession in such State of any alcoholic beverage by a person who is less than 21 years of age (other than any person who is 18 years of age or older on the day preceding the effective date of such law and at such time could lawfully purchase or publically possess any alcoholic beverage in such State), such state shall be deemed to be in compliance with paragraphs (1) and (2) of this subsection in each fiscal year in which such law is in effect.

(b) Period of availability; effect of compliance and noncompliance.

(1) Period of availability of withheld funds.--

(A) Funds withheld on or before September 30, 1988.--Any funds withheld under this section from apportionment to any State on or before September 30, 1988, shall

remain available for apportionment to such State as follows:

(i) If such funds would have been apportioned under section 104(b)(5)(A) of this title but for this section, such funds shall remain available until the end of the fiscal year for which such funds are authorized to be appropriated.

(ii) If such funds would have been apportioned under section 104(b)(5)(B) of this title but for this section, such funds shall remain available until the end of the second fiscal year following the fiscal year for which such funds are authorized to be appropriated.

(iii) If such funds would have been apportioned under section 104(b)(1), 104(b)(2) or 104(b)(6) of this title but for this section, such funds shall remain available until the end of the third fiscal year following the fiscal year for which such funds are authorized to be appropriated.

(B) Funds withheld after September 30, 1988.--No funds withheld under this section from apportionment to any State after September 30, 1988, shall be available for apportionment to such State.

(2) Apportionment of withheld funds after compliance.--If, before the last day of the period for which funds withheld under this section from apportionment are to remain available for apportionment to a State under paragraph (1)(A), the State makes effective a law which is in compliance with subsection (a) the Secretary shall on the day following the effective date of such law apportion to such State the withheld funds remaining available for apportionment to such State.

(3) Period of availability of subsequently apportioned funds.--Any funds apportioned pursuant to paragraph (2) shall remain available for expenditure as follows:

(A) Funds apportioned under section 104(b)(5)(A) of this title shall remain available until the end of the fiscal year succeeding the fiscal year in which such funds are so apportioned.

(B) Funds apportioned under section 104(b)(1), 104(b)(2), 104(b)(5)(B) or 104(b)(6) of this title shall remain available until the end of the third fiscal year succeeding the fiscal year in which such funds are so apportioned.

Sums not obligated at the end of such period shall lapse or, in the case of funds apportioned under section 104(b)(5) of this title, shall lapse and be made available by the Secretary for projects in accordance with section 118(b) of this title.

(4) Effect of noncompliance.--If, at the end of the period for which funds withheld under this section from apportionment are

available for apportionment to a State under paragraph (1), the State has not made effective a law which is in compliance with subsection (a), such funds shall lapse or, in the case of funds withheld from apportionment under section 104(b)(5) of this title, such funds shall lapse and be made available by the Secretary for projects in accordance with section 118(b) of this title.

(c) Alcoholic beverage defined.--As used in this section, term "alcoholic beverage" means--

(1) beer as defined in section 5052(a) of the Internal Revenue Code of 1954,

(2) wine of not less than one-half of 1 per centum of alcohol by volume, or

(3) distilled spirits as defined in section 5002(a)(8) of such Code.

STATEMENT OF THE CASE

In June, 1984, Congress passed, and the President signed, a bill amending the Surface Transportation Act of 1982. Public Law 98-363, Section 6, 98 Stat. 435, 437-438. The Act, as amended, requires that each state adopt a minimum drinking age of 21. If any state failed to do so, on or before October 1, 1986, it had five per cent of its

fiscal year 1987 federal aid highway funds withheld by the Secretary, even though the funds were otherwise apportioned to the State. In fiscal year 1988, ten per cent of such funds would be withheld.

As amended by Pub.L. 99-272, Title IV, §4101, the statute requires that the funds withheld prior to September 30, 1988, be available for apportionment to states adopting, after September 30, 1986, a drinking age of twenty-one. This availability would continue for one, two, or three fiscal years after appropriation of the funds, depending on the type of funds involved. Interstate construction funds, 23 U.S.C. §104(b)(5)(A), remain available to the State only until the end of the fiscal year for which the funds were authorized to be appropriated. If, by the end of that fiscal year, the State has not complied with the national minimum drinking age, the funds are no longer

available for apportionment to the State. 23 U.S.C. §158(b)(1)(A)(i).

Interstate resurfacing, restoring, rehabilitating and reconstructing funds, 23 U.S.C. §104(b)(5)(B) remain available for apportionment to the State until the end of the second fiscal year following the fiscal year for which such funds are authorized to be appropriated. Thus, funds authorized to be appropriated for fiscal year 1987 and fiscal year 1988 could remain available to noncomplying states, if they later comply, until the end of the second fiscal year following the year of their appropriation.

Finally, funds under the federal aid primary, 23 U.S.C. §104(b)(1), federal aid secondary, 23 U.S.C. §104(b)(2) and federal aid urban, 23 U.S.C. §104(b)(6), programs, remain available for apportionment to noncomplying states until the end of the third fiscal year following the fiscal year for

which those funds are authorized to be appropriated. No funds withheld after September 30, 1988, will be available for apportionment to any state if it has not complied by that date. 23 U.S.C. §158(b)(1)(B).

The State of South Dakota brought this action challenging the constitutionality of 23 U.S.C. §158. The complaint was filed in United States District Court for the District of South Dakota, Western Division, in September, 1984. Appendix to the Petition for Certiorari (hereinafter PA) PA 41. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. §1331. The State sought relief under 28 U.S.C. §§2201 and 2202, the Declaratory Judgment Act. The complaint alleged that setting drinking ages is a core power of the State within the Twenty-first Amendment. PA 43; PA 44; PA 49.

The Complaint alleged that South Dakota permits possession and purchase of low point beer (beer of less than 3.2 per cent alcohol by weight) by persons nineteen and twenty years old. PA 44-45; See S. D. Cod. L. Ann. §§35-4-78; 35-6-27 (1986).

The State of South Dakota has maintained the system of allowing persons younger than twenty-one to drink low point beer since March, 1939. From March, 1939 through July 1, 1965, persons aged eighteen and older were permitted to purchase and drink low point beer. From July 1, 1965 to July 1, 1972, persons aged nineteen and older were permitted to purchase and drink low point beer. The State permitted persons aged eighteen and older to purchase and drink low point beer from July 1, 1972 to July 1, 1984. From July 1, 1984 to the present, the State has allowed persons aged nineteen and older to purchase and drink low point beer. The

State of South Dakota has, since the repeal of state prohibition in November, 1934, required that all persons be aged twenty-one years or older in order to purchase and drink any alcoholic beverage of a greater strength than low point beer. PA 44-45.

Defendant filed a motion to dismiss in December, 1984, contending that the conditioning of a congressional grant on any state act is constitutional and violates neither the Tenth nor the Twenty-first Amendments. PA 52. The District Court, acting pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), dismissed the complaint on May 3, 1985. PA 24 and PA 41.

The District Court found that the case was ripe for decision and that the State had standing to bring the lawsuit. PA 26-28. The District Court rejected the State's arguments on the merits, however, finding that there was no conflict between the federal and state

legislation, but that even if there were a conflict, the balance must be struck in favor of the congressional action. PA 35-38.

The State appealed the dismissal of its complaint to the United States Court of Appeals for the Eighth Circuit on June 26, 1985, pursuant to 28 U.S.C. §1291. That court affirmed by opinion and judgment dated and filed May 21, 1986. In upholding the District Court, the Court of Appeals found that the State's authority to adopt the minimum drinking age did not arise from the Twenty-first Amendment. The court held that the Twenty-first Amendment had not increased the State's powers of liquor regulation. PA 14-15. The court further refused to recognize that the Twenty-first Amendment contracted federal authority over alcohol. PA 17-18. The Court of Appeals further found no conflict between the federal and State law. PA 19-20. Finally, the Court of

Appeals held that no judicial relief was available to the State under the Tenth Amendment. Rather, the court held, the State must seek to protect its interests through the political process.

SUMMARY OF ARGUMENT

The District Court dismissed this case on a motion under F.R.C.P. 12(b)(6). This Court, therefore, reviews the matter de novo and must give the State the benefit of all reasonable inferences of fact arising from the complaint.

The State of South Dakota has the prerogative, as one of the sovereign states of the United States, to control the distribution of liquor within its own borders. The states have always possessed this prerogative, even before adoption of the Eighteenth and the Twenty-first Amendments to the Constitution of the United States. Prior to adoption of these two Amendments, the power

to regulate liquor traffic and distribution within the State arose from the police power. The power was, however, significantly expanded by adoption of the Twenty-first Amendment. See e.g. City of Newport, Kentucky v. Iacobucci, 107 S.Ct. 383 (1986); Brown-Forman Distillers Corporation v. New York State Liquor Authority, 106 S.Ct. 2080 (1986); California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). This specific constitutional grant of authority to the states differentiates this case from other Spending Clause and Commerce Clause cases decided by this Court. Where the Constitution specifically delegates a power to the states, the State's interest is much weightier than it would be without such a specific delegation.

This power is not without limit. It may yield in specific instances to other constitutional provisions. Where a

Twenty-first Amendment core interest is implicated, however, a state's interests are given greater weight. This case presents a core interest. The national interest asserted is only a general Spending Clause interest.

Under the constitutional scheme of federalism, the states are not merely departments or subdivisions of the federal government. Rather, they are sovereign within all areas not granted to the national government. U.S. Const., amend. 10. This Court will protect the independent existence of the states in the federal system because that independent existence is inherent in the Constitution. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, reh'g denied, 471 U.S. 1040 (1985). Local Control promotes participation in the democratic process and allows local people to fashion appropriate solutions to local

problems. The states can, further, serve as laboratories for social and economic experiments.

Whatever the limits may be where a state seeks protection for its reserved powers (U.S. Const. Amendment 10), the State's arguments have greater force when the State seeks to protect its specifically delegated powers under the Twenty-first Amendment. This Court's cases allow the State to prevail where its interests are at the core of the Twenty-first Amendment in the face of directly conflicting federal policy. 324 Liquor Corp. v. Duffy, 55 U.S.L.W. 4094, 4098 (1987).

The State in this case asserts a core power under the Twenty-first Amendment. The core powers over which the states have "virtually complete control" are "whether to permit importation or sale of liquor and how to structure the liquor distribution system."

Midcal, 445 U.S. at 110. Under this definition, the setting of drinking ages is a core concern since it is part and parcel of structuring the liquor distribution system. Congress itself has recognized this and has traditionally respected the rights of the states in this area.

The Secretary has asserted below that the State's only core concern under the Twenty-first Amendment is reduction of the evils traditionally associated with consumption of alcohol, or "temperance." She then argued that permitting nineteen and twenty year olds to drink low strength beer did not implicate a temperance interest. The Secretary then sought to balance against the asserted non-core interest, the interest of Congress in saving lives by reducing driving while intoxicated. The State contends that this argument construes the core area of the Twenty-first Amendment too narrowly and that

it makes little sense in light of the fact that the Twenty-first Amendment was designed to permit drinking rather than promote temperance.

In the alternative, however, the State does assert a temperance interest. It was reasonable, as shown by scientific studies, for the State Legislature to find that controlled drinking by nineteen and twenty year olds promotes temperance to a greater degree than prohibition. Prohibition does not reduce drinking by nineteen and twenty year olds. Rather, it forces them to drink in cars, or in remote areas to which it is necessary to drive.

The Secretary has also consistently argued below that this case is governed by Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947). That case held that even through the national government may have no interest in regulating state

government structure, it could withhold funds from the State of Oklahoma if it permitted a State Democratic party leader to sit on its highway commission. From this case, the Secretary has drawn the conclusion that Congress may attach whatever strings it chooses to the granting of funds to any state. This contention is in error for several reasons. First, neither Oklahoma, nor any of its progeny, dealt with a situation in which powers had been specifically delegated to the State by the United States Constitution. The power to regulate liquor, pursuant to the Twenty-first Amendment, is entitled to greater protection than a power merely reserved pursuant to the Tenth Amendment.

Second, in no case prior to the present case has Congress made an attempt to displace, withdraw, and usurp a power specifically granted by the United States

Constitution to the states. Because of the nature of the intrusion, this Court must protect the specifically delegated power of the State.

Third, it is well settled that neither Congress, nor any state legislative body, may require a waiver of constitutional prerogatives in order to obtain a governmental benefit. Sherbert v. Verner, 374 U.S. 398 (1963). In the case at bar, Congress requires the surrender of a specifically delegated Twenty-first Amendment power as a condition for receipt of money. Verner holds that this may not be done, even where the legislative body is not otherwise required to grant money.

Where state and national interests conflict under the Twenty-first Amendment state interests will prevail if they are at the core of the Amendment. The issue is whether the State or the national choice is

to prevail. The State has a core interest in regulating liquor; Congress has only its usual Spending Clause powers. The state regulation, therefore, prevails.

By enacting 23 U.S.C. §158, Congress has sought, for the first time since the adoption of the Twenty-first Amendment, to assume absolute control of a significant portion of the core area of liquor regulation reserved to the states. If Congress may, by the subterfuge of withholding money, usurp those powers specifically delegated to the states, the independent existence of the states as sovereigns within the federal system is threatened. The State respectfully contends that judicial intervention is required in this case to preserve the independent existence of the State of South Dakota in the federal system.

The State therefore requests that the judgment of the Eighth Circuit Court of

Appeals in this case be reversed, and that the case be remanded so that appropriate relief in favor of the State may be entered.

ARGUMENT

I

23 U.S.C. §158, THE NATIONAL MINIMUM DRINKING AGE, AS AMENDED THROUGH APRIL 7, 1986, UNCONSTITUTIONALLY DISPLACES THE STATE'S CORE POWER, UNDER THE TWENTY-FIRST AMENDMENT, TO SET MINIMUM DRINKING AGES.

A. This Court Must Review the Case De Novo.

The motion to dismiss, addressed to the trial court and affirmed by the Court of Appeals, was based upon Federal Rules of Civil Procedure, Rule 12(b)(1) and 12(b)(6). PA 52. The trial court granted the motion pursuant to Rule 12(b)(6). PA 40. The proper standard for the trial court to consider when determining the sufficiency of a complaint under Rule 12(b)(6) was stated in Conley v. Gibson, 355 U.S. 41, 45-46 (1957) as follows:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. [Footnote omitted.]

Thus, the District Court, the Court of Appeals, and this Court, may not go beyond the pleadings and must determine the question as a matter of law. To the extent that the historical facts play any part in the determination of such a motion, they may be construed against the nonmoving party only if the nonmoving party has failed to allege them. The plaintiff must be given the benefit of all reasonable inferences that can be drawn from the allegations. Jenkins v. McKeithen, 395 U.S. 411, 421-422 (1969).

In reviewing such a determination, this Court is deciding an issue of law. For these reasons, this Court must consider the case de novo.

B. The State has Greater Powers to Regulate Alcohol Distribution Under the Twenty-first Amendment Than it Has Over Other Articles of Commerce.

The State of South Dakota has the sovereign prerogative to regulate the consumption of alcoholic beverages within its borders. This prerogative is supported by the police power and existed prior to the adoption of the Twenty-first Amendment. See Clark Distilling Company v. Western Maryland Railway, 242 U.S. 311 (1917); Rhodes v. Iowa, 170 U.S. 412 (1898); Scott v. Donald, 165 U.S. 58 (1897); In Re Rahrer, 140 U.S. 545 (1891).

As the cited cases indicate, however, the State's police power was insufficient to effectively regulate the liquor traffic. Congress, therefore, granted the additional power discussed in these cases. After repeal of the Eighteenth Amendment, the Twenty-first Amendment provided that the transportation or

importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, was prohibited. The Amendment's legislative history strongly supports the proposition that the states' rights to regulate alcohol are greatly strengthened by the Amendment. For example, section 3 of the Amendment, which stated, "Congress shall have the concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold" was rejected by the Senate. 76 Cong.Rec 4229 (1933). In so rejecting this section, Senator Wagner noted:

The real cause of the failure of the Eighteenth Amendment was that it attempted to impose a single standard of conduct on all of the people the United States without regard to local sentiment and local habits.

76 Cong.Rec. 4146.

In addition, Senator Wagner stated as follows:

If Congress may regulate the sale of intoxicating liquors where they are to be drunk on premises where they are sold, then we shall probably see Congress attempt to declare during what hours such premises may be open, where they shall be located, how they shall be operated, the sex and age of the purchasers the price at which the beverages are sold. (Emphasis added.)

76 Cong.Rec. 4147 (remarks of Senator Wagner).

In addition, Senator Wagner stated: "We have expelled the system of national controls through the front door of section 1, and readmitted it through the back door of section 3." Id.

An opposing view was that the Amendment was intended only to allow those states which wish to remain "dry" to do so. See remarks of Senator Fess, 76 Cong.Rec. 4168 (1933). Because of the ambiguity of the legislative

history, this Court has concentrated primarily on the Twenty-first Amendment's language rather than the legislative history. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 274-276 (1984); California Retail Liquor Dealers Assn. v. Midcal Aluminum, 445 U.S. 97, 107 n. 10 (1980). It is beyond doubt, however, that the Twenty-first Amendment confers something more upon the states than the ordinary police power to regulate alcoholic beverages. City of Newport, Kentucky v. Iacobucci, 107 S.Ct. 383, 385 (1986) (per curiam); California v. LaRue, 409 U.S. 109, 114 (1972). The State now asks this Court to determine whether anything remains of these constitutional powers where Congress seeks to abrogate them.

C. State Powers Under the Twenty-first Amendment are Extensive.

This Court has always recognized the authority of the States as being greater

under the Twenty-first Amendment than it is under the general police power. See, e.g., City of Newport, Kentucky v. Iacobucci, 107 S.Ct. at 385; Brown-Forman Distillers v. New York State Liquor Authority, 106 S.Ct. 2080, 2087-2088 (1986); New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) (per curiam); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Joseph S. Finch and Company v. McKittrick, 305 U.S. 395 (1939); Mahoney v. Joseph Triner Corporation, 304 U.S. 401 (1938); State Board of Equalization of California v. Young's Market Company, 299 U.S. 59 (1936).

These cases recognize "virtually complete control" by the states of the core area of Twenty-first Amendment, California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. at 110. This core area has been defined as the times, place and manner in which liquor may be imported or sold.

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

The State acknowledges that a number of cases have stricken State liquor regulations as being in conflict with federal law. These cases, however, have found that the asserted authority was outside the core area. See e.g. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 274-276 (1984); Capitol Cities Cable Inc. v. Crisp, 467 U.S. 691, 712-714 (1984).

In other cases, overriding constitutional concerns were held to outweigh the State's exercise of its power under the Twenty-first Amendment, and the State's interest, therefore, was required to yield. Craig v. Boren, 429 U.S. 190, 206 (1976). (The State could not use Twenty-first Amendment power to invidiously discriminate on the basis of gender.) California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. at 113-114 (federal exercise

of Commerce Power prevailed where State had minimal interest in pricing regulations). 324 Liquor Corp. v. Duffy, 55 U.S.L.W. 4094, 4097 (1987) (same); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). (Liquor regulations could not be used to give a church veto power over the location of liquor sellers.)

Because it represents an express grant of power to the states, the Twenty-first Amendment is unique in the American constitutional scheme, and cases under it have been universally treated differently from other state/federal conflicts. The Twenty-first Amendment operates as a specific limitation on congressional power. Midcal 445 U.S. at 107-108. Within the core area, "the Twenty-first Amendment grants the states virtually complete control. . . ." Id. See Capitol Cities Cable, Inc. v. Crisp, 467 U.S. at 715, describing the core area as "the conditions under which liquor may be imported

or sold," and "directly [regulating] the sale or use of liquor within [the state's] borders." Id. at 713.

In this respect, state laws under the Twenty-first Amendment are on a par with laws passed by Congress. Neither the state nor federal laws may violate guarantees of individual liberties, which the Fourteenth Amendment, and the Bill of Rights, guarantee to citizens of the United States. Craig v. Boren, 429 U.S. 190 (1976). Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). These cases contrast with the cases where the state's Twenty-first Amendment powers have been found sufficient to overcome asserted First Amendment protections. See City of Newport, Kentucky v. Iacobucci, 107 S.Ct. 383 (1986). All of these cases illustrate the strength and uniqueness of state powers under the Twenty-first Amendment.

This case is not, however, controlled by any of the cited cases. There is here a conflict between a specific core interest of the State and a generalized federal Spending Power regulation. This case is one of first impression. Congress has not previously attempted to directly regulate core interests of the states to the same degree. The case presents questions of the greatest importance to the preservation of the federal system, and the preservation of the State's independent existence within that system.

D. The Independent Existence of the States Within the Federal System is Endangered by 23 U.S.C. §158.

The State recognizes that the national government has broad powers under various clauses of the United States Constitution, including the Spending Clause, Art. I, §8, cl. 1. The State also recognizes the existence of the Supremacy Clause of the United States Constitution. Ordinarily, laws

enacted by Congress prevail over those enacted by the states.

This Court has always recognized, however, that the states have an independent function within the federal system, and that they are not mere political subdivisions of the national government. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556-557, 568-570 (Powell, J., dissenting); 580-582 (O'Connor, J., dissenting). Admittedly, the degree to which the federal judiciary will protect the states from congressional overreaching is narrowed considerably by Garcia, particularly in Commerce Clause cases. This case is, however, differentiated in Garcia, and from cases dealing with the Spending Clause in other contexts, by the specific nature of delegated powers under the Twenty-first Amendment. In this case, the State is also

acting under a power found in the United States Constitution.

As is plain from a contrast of Garcia with National League of Cities v. Usery, 426 U.S. 833 (1976) and Maryland v. Wirtz, 392 U.S. 183 (1968), there is a great difference of opinion, even among the members of this Court, as to the limits of national authority that encroaches upon state prerogatives. The State would contend only that many good reasons exist for preserving the powers of the states when they conflict with an exercise of national power.

Members of this Court have set forth the goals and purposes of the doctrine of federalism under the Constitution of the United States. First, local control encourages citizen participation in the democratic process. City of Rome v. United States, 446 U.S. 156, 201, n. 12 (1980) (Powell, J. dissenting); Federal Energy

Regulatory Commission v. Mississippi, 456 U.S. 742, 789-790 (1982) (O'Connor, J. concurring and dissenting). Local government is better able to tailor local programs and concerns to local needs. This is important in a large, pluralistic, non-homogenous society such as ours. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 50 (1973). Next, the states and localities have traditionally functioned as laboratories, and have tried novel social and economic experiments without risks to the rest of the country. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). Local governments continue to have importance in a far flung, free society such as that of the United States. See Federal Energy Regulatory Commission v. Mississippi, 456 U.S. at 788-790 (O'Connor, J. concurring and dissenting).

In addition, federalism, or separation of the national functions and state functions, requires a proper respect for state powers, and recognizes the fact that the country is made up of the union of separate state governments. Our constitutional history and form of government inherently recognize that the national government, and the people, will fare best if the states and their institutions are left free to perform their separate functions in their separate ways. Younger v. Harris, 401 U.S. 37 (1971).

As was emphasized in The Status of Federalism in America, Report of the Working Group on Federalism of the Domestic Policy Council, (1986), at 56-57, (copy lodged with the Clerk together with this Brief) state legislative bodies are more responsive to their constituents, and are closer to them, than is Congress. The states can make public policies suited to their unique

circumstances. In this case, for example, the imposition of a twenty-one drinking age may make considerable sense along the eastern seaboard with its large urban areas, ill defined state lines, and notorious "blood border" problem. In the State of South Dakota, however, a glance at any road map or atlas will show that there are no major urban areas within fifty miles of the borders of the State of South Dakota with the possible exception of the Sioux City, Iowa, area. It is plain that the situation with regard to so-called "blood borders" in the State of South Dakota is considerably different that it is in the States of New York, Delaware, Connecticut, Maryland, Virginia, or in the Washington, D.C. area. One national standard ignores these differences, and denies the states the option of matching local laws to local needs and concerns.

Finally, as Justice Powell recognized in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 570-572 (1985), (Powell, J., dissenting), state sovereignty is an essential safeguard of liberty as it is understood under the American constitutional system. In order to maintain the constitutionally mandated balance of power between the states and the national government, a balance designed to protect our fundamental liberties, it is necessary that the courts act as a check upon overreaching by the national government. To deny the states their separate policy choices, particularly where those choices are protected by the United States Constitution, is to deny the people much of their right of self-government.

If there is to be any limit on the Congress' ability to usurp traditional state functions, it must exist in this case where

the United States Constitution has specifically delegated powers over alcoholic beverages to the states. In a very real sense, this case is different from those cases in which other federal encroachments on state powers have been approved. The states here have a specifically delegated power. See 324 Liquor Corp. v. Duffy, 55 U.S.L.W. 4094, 4097 (1987), Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 712; California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 at 107-110. If this Court is to protect any of the delegated or reserved powers of the states under the doctrine of federalism, it must do so in this case.

E. The Extent of State Powers Under the Twenty-first Amendment Requires that 21 U.S.C. §158 Be Invalidated.

1. The setting of drinking ages, at whatever level, is a core concern of the states under the Twenty-first Amendment.

This Court has stated that where a liquor regulation adopted by a state is within the core area of the Twenty-first Amendment, it can prevail over federal constitutional claims and over claims of federal law even where it directly conflicts with national policies. See 324 Liquor Corp. v. Duffy, 55 U.S.L.W. at 4098; City of Newport, Kentucky v. Iacobucci, 107 S.Ct. 383 (1986) (per curiam); Brown-Forman Distillers Corporation v. New York State Liquor Authority, 106 S.Ct. 2080 (1986); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Capital Cities Cable Inc. v. Crisp, 467 U.S. 691 (1984); New York State Liquor Authority v. Ballanca, 452 U.S. 714 (1981); California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); California v. LaRue, 409 U.S. 109 (1972). This core area has been variously defined in the cases. Whether the interest implicated by

state regulations are so closely related to the powers reserved by the Twenty-first Amendment is the essential question presented in cases of this sort. Midcal stated that the Twenty-first Amendment grants the states "virtually complete control" over "whether to permit importation or sale of liquor and how to structure the liquor distribution system." Id. at 110. Crisp held that regulation of cable television advertisement, in contrast to regulations governing conditions under which liquor may be imported or sold, was of lesser concern to the State. In Bacchus Imports, the Court elaborated on the balancing test. In so doing, however, the Court refined the definition of the core area to include sale and distribution of liquor within a state's borders.

These cases concentrate on the nature of regulation of alcohol by the state. The core power of Section 2 of the Twenty-first

Amendment is the power to regulate the sale and use of liquor within the State's borders. Section 2 grants this power to the states. Thus, although the legislative history may be ambiguous, it is subject to an interpretation that the intent of the Twenty-first Amendment was to allow the states to structure their own liquor distribution systems. 324 Liquor Corp. v. Duffy, 55 U.S.L.W. at 4097-4098. This is the interpretation that this Court has chosen. Indeed, this interest is important enough that the freedom of expression may be regulated to a greater extent that it could be in the absence of the amendment. Iacobucci, 107 S.Ct. at 385.

It is plain that the setting of a drinking age, at whatever level, is well within the core powers of Section 2 of the Twenty-first Amendment. As Senator Wagner recognized, 76 Cong.Rec. at 4147 (1933), regulation of the "sex and age of the

purchasers" of alcoholic beverages is part and parcel of structuring the liquor distribution system. There is no power imaginable that could be closer to the core of the Twenty-first Amendment. If the Congress may set a national minimum drinking age, it may structure the nation's liquor distribution system in any fashion that it chooses.

The Secretary may well wish to restrict the State's Twenty-first Amendment powers to a decision as to whether the State remains "dry." As a practical matter, however, this amounts to no power at all. There are no states within which all importation and sale of alcoholic beverages are totally prohibited. States restrict importation and sale of alcoholic beverages by various means. One of those means is to adopt a drinking age. S.D. Cod. L. Ann. §§35-4-78; 35-6-27 (1986). Other means are regulation of where

the beverages can be sold, number of licenses that may be issued, id. §§35-4-10; 35-4-11; 35-4-11.1, total state control over the licensing process, id. chs. 35-2; 35-4, and other regulations, id. title 35 generally. These regulations, while less than total prohibition, are protected under the Twenty-first Amendment. Iacobucci, 107 S.Ct. at 385; Midcal, 445 U.S. at 110. There is no principled distinction between the drinking age and other regulations of time, place and manner of sale of alcohol.

In addition, Congress has traditionally respected the rights of the states to structure sale and distribution of liquor within their borders. In this instance, however, by adopting a national minimum drinking age, Congress has directly displaced those regulations adopted by the states and adopted its own regulations. It has exceeded the permissible bounds that this Court has

recognized. 23 U.S.C. §158 operates directly on regulation of sale and distribution of liquor within the State in a way that past congressional acts have not. It usurps a core power of the states.

The Secretary has previously argued that the State's only interest under the Twenty-first Amendment is "temperance." Aside from the fact that the Amendment itself was adopted to allow drinking, rather than promote temperance, this argument is against the weight of the cited authority. Even if the Secretary's contentions are correct, however, the State has a temperance interest in its nineteen-year-old drinking age. Reputable studies show that a drinking age of twenty-one does not work to reduce drunken

driving,¹ and the State has therefore adopted

¹The State hereby lodges with the Clerk certain studies as follows:

Birkley, et al., Traffic Accidents and the Legal Drinking Age in Wisconsin: A Second Opinion, (1983).

Bolotin and DeSario, Preliminary Report: The Politics and Policy Implications of a National Minimum Drinking Age, Case Western Reserve University, Department of Political Science (1985).

Choukrun, Raun and Waner, The Relationship Between Increases in Minimum Purchase Age for Alcoholic Beverages and the Number of Traffic Fatalities, Social Systems Sciences Working Papers, the Wharton School, University of Pennsylvania (1985)

Hingson, et al. Impact of Legislation Raising the Legal Drinking Age in Massachusetts from 18 to 20, 73 American Journal of Public Health 163 (1983)

Males, Mike A., The Minimum Purchase Age for alcohol and Young-Driver Fatal Crashes--A Long-term View (1984)

Males, Mike A., Three Drinking Age Anomalies (1985)

Morris, Michael F. Drinking-Driver Behavior (Footnote Continued)

the very reasonable alternative of permitting drinking by nineteen and twenty year olds in bars, or legally, in order to regulate the drinking. It is plain that those of the ages of nineteen and twenty, and perhaps those

(Footnote Continued)

in Florida-1983 Update (February, 1985)

This Court routinely relies on studies bearing on the reasonableness of legislation. Muller v. Oregon, 208 U.S. 412, 419-420 (1908); See also Miranda v. Arizona, 384 U.S. 436, 448, n. 8 (1966); Brown v. Board of Education, 347 U.S. 483, 494, n. 11 (1954). The State does not mean to suggest that its approach is the only reasonable, or correct, one. Rather, it is reasonable within the broad discretion granted to legislatures. See New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976); Williamson v. Lee Optical Co., 348 U.S. 483, 487-491 (1955); Railway Express Agency Inc. v. New York, 336 U.S. 106, 109-110 (1949); United States v. Carolene Products Co., 304 U. S. 144, 148-154 (1938). Perhaps the policy choice of the Congress is also reasonable. No doubt studies could be cited in favor of that choice. The issue here is, however: Which legislative body has the power to choose the State's drinking age?

from the age of sixteen and one-half,² are prone to drink alcoholic beverages in any event. The South Dakota system promotes keeping some teenage drinking under control by legalizing it and allowing those who would be drinking anyway to do so in a more controlled fashion under state regulations. Thus, a temperance interest is implicated, and no matter how it is defined, the State raises a core interest under Section 2 of the Twenty-first Amendment.

2. The national exercise of power in this case squarely conflicts with the State's exercise, and a balancing of interests is required.

In its decision in this matter, the Eighth Circuit found that there was no conflict between South Dakota statute and the congressional action. State of South

²Hingson, et al., supra. n. 1.

Dakota v. Dole, 791 F.2d 628, 633-634 (8th Cir. 1986). This holding was based on the proposition that the federal action did not require the State to adopt a drinking age of twenty-one, but merely provided an incentive for the State to adopt a twenty-one drinking age. This holding ignores the reality of the situation, and, to some extent, conflicts with this Court's holdings in other spending clause cases. See Lawrence County v. Lead-Deadwood School District No. 40-1, 469 U.S. 256, 269-270 (1985); Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947); Steward Machine Company v. Davis, 301 U.S. 548 (1937); United States v. Butler, 297 U.S. 1 (1936). These cases set limits on congressional exercise of the Spending Power. Oklahoma, broad though the congressional powers under it are, stated that coercion of a state into doing the federal will is not permissible. Because this case was dismissed

on a Federal Rules of Civil Procedure, Rule 12(b)(6) motion, there has been no fact finding conducted as to whether the loss of these federal funds would so impair the State's existence or its functioning in the federal system that coercion is involved. Second, Lawrence County, 469 U.S. at 269-270, recognizes that a controlling constitutional provision may prevent Congress from doing what it otherwise would be permitted to do under the Spending Clause.

The State contends that the Twenty-first Amendment is just such a provision. As was demonstrated in the immediately preceding section, the Twenty-first Amendment, unlike other constitutional provisions, grants powers to the State. The State's interest in this matter must be balanced against the federal interest, since the State's interest here is directly at the core of the Twenty-first

Amendment. Midcal, 445 U.S. 107-108; 110. The Twenty-first Amendment, as a controlling constitutional provision granting certain powers to the states can, therefore, overcome the Spending Clause powers of Congress.

The State has never contended that the congressional action was unreasonable, or unrelated to a national concern in the absence of the Twenty-first Amendment. The Twenty-first Amendment, however, removed the regulation of intrastate liquor distribution from the federal ambit to a significant degree. In granting the power to structure the State's liquor distribution to the State, Midcal, 445 U.S. at 110, the Twenty-first Amendment prohibited the national government from directly displacing these core powers, and allowed the states to have free exercise of them. Because of the controlling constitutional provision of the Twenty-first Amendment, Section 2, the Congress may not

use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment. See Lawrence County, 469 U.S. at 269-270.

It is plain that this conflict must be found if anything is to be preserved of the State's powers to regulate liquor under the Twenty-first Amendment. If the State's Twenty-first Amendment powers are not protected, then the goals of federalism, related above, are in danger. It is a fact of life that the states have practical financial needs. Adequate state and local services can not be provided in absence of federal funding. Given this fact, the possibility of refusing federal grants is more apparent than real. This Court has always protected the essentials of state sovereignty, even though those essentials may have shrunk to some degree. See Garcia, 469 U.S. at 556. This Court should not allow the

Congress to choose a spending clause subterfuge to accomplish that which it could not accomplish directly, and, in the process, override a controlling constitutional provision.

While it may be true that the record, at this time, does not support the proposition that the State must necessarily accept the congressional inducement, it is plain that the adoption of the national minimum drinking age has had a significant impact on the states' free choices permitted to them under the Twenty-first Amendment. Even in absence of further fact-finding, the impact of \$8 million per year on a state the size of South Dakota should be readily apparent. If further fact-finding on this issue is required, however, the State has not yet been given the opportunity to present evidence, and a remand would be necessary.

This Court should, where Twenty-first Amendment powers are in question, consider the reality of the situation in light of that controlling constitutional provision. The Congress has taken upon itself to abrogate the delegated powers of the State. If 23 U.S.C. §158 is not overturned, then the power to determine the State's drinking age has been transferred to Congress.

As has been said above, the Twenty-first Amendment delegates a specific power to the states to structure their liquor distribution systems. Midcal, 445 U.S. at 107-108; 110. This Court has held in other contexts that legislative bodies have no authority to force individuals to give up specific constitutional rights in exchange for money. See Sherbert v. Verner, 374 U.S. 398 (1963). Verner held that a Seventh Day Adventist could not be required to give up her religious tenets and required to work on

a Saturday as a condition of receiving state unemployment benefits. The Court has subsequently applied this analysis in protection of other constitutional freedoms. See Harris v. McRae, 448 U.S. 297, n. 19 at 317, reh'g denied, 448 U.S. 917 (1980); Tinker v. Des Moines Community School District, 393 U.S. 503, n. 2 at 506 (1969); North Carolina v. Pearce, 395 U.S. 711 (1969) (due process bars imposing an increased sentence on a defendant re-convicted after a successful appeal, absent specific reasons for an increased sentence).

This analysis applies to the present case. The Twenty-first Amendment grants a specific power to the State in the same way that the Fourteenth Amendment grants specific rights to individual citizens. Congress, by adopting 23 U.S.C. §158, required the State to give up this specific constitutional power in order to gain money. It is clearly

settled that a government benefit may not be made contingent upon waiver of a constitutional right.

This analysis would not upset the traditional balance under the Spending Clause. The State is acting in a different capacity in adopting alcohol regulations than it is in exercising the other powers that it may have. When the State regulates alcohol, it exercises a power delegated to it by the United States Constitution. When it adopts any other regulations, it exercises powers arising from other sources, such as the police power or its power under the State Constitution.

Congress is only prohibited from adopting a spending clause regulation if the power it seeks to displace is specifically granted to the states by the United States Constitution.

On the other hand, it is necessary that the states' rights to regulate alcohol distribution be protected if any of the states' sovereign powers are to receive judicial protection. This is because the Court must protect a power specifically delegated by the United States Constitution if there is any hope for judicial protection of those rights that are merely reserved.

3. The balance of interests tips in favor of the State in this case.

In Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 713, this Court held that a conflicting exercise of federal authority may prevail over a state exercise of authority where the state has not attempted directly to regulate the sale of liquor within its own borders. In 124 Liquor Corp. v. Duffy, 55 U.S.L.W. at 4097-4099; Bacchus Imports, 468 U.S. at 274-276; Midcal, 445 U.S. at 107-110; and Hostetter v. Idlewild Bon Voyage Liquor

Corp., 377 U.S. 324 (1964), this Court balanced the interests of a state against the national government, and considered each of the powers in light of the other in the context of the issues and interests at stake in a concrete case. The Court described this effort as a pragmatic effort to harmonize the state and national powers.

In this case, the State would contend that powers can not be harmonized. The federal government has stated a policy whereby all states must adopt a drinking age of twenty-one. The State of South Dakota, and several other states, have decided that the drinking ages within their borders should be lower than twenty-one. An effort to harmonize these conflicting policy decisions is bound to fail. For that reason, a decision must be made, based upon the appropriate balancing test, as to which regulation is to prevail. Congress asserts an interest in the

general welfare, based upon its belief that a national twenty-one drinking age will promote safety on the highways and reduce driving while intoxicated. The State of South Dakota has a similar interest. PA 44-45. It has, however, sought to promote this interest in a way different from that chosen by the Congress.

The State acknowledges that the Supremacy Clause, United States Constitution, would ordinarily allow the congressional action to prevail if the action were within the sphere of national power of policy. See United States v. Butler, 297 U.S. 1 (1936). In this case, however, the generalized spending clause power must be balanced against the particularized core power of the state to regulate alcohol distribution under the Twenty-first Amendment. This Court made it quite clear in 324 Liquor, Midcal, Bacchus and Crisp that there would be times when the

core interests of a state would prevail over express federal policies because the interest asserted was closer to the core of the Twenty-first Amendment than were the interests asserted in most cases.

This is just such a case. It is apparent that if any state powers are to be protected, it must be those powers at the core of the Twenty-first Amendment. The power to establish a drinking age is just such a power. It is entitled to judicial protection.

A failure to protect this power, however, would have much broader implications for the concept of federalism under the United States Constitution. If this Court will not protect a core power under the Twenty-first Amendment, then none of the states have any protection other than that offered by Congress itself. The State thus seeks primarily to preserve its sovereignty

and its powers under the Twenty-first Amendment. It also seeks to protect the goals of federalism as espoused by this Court and by the framers of the Constitution.

The State also has a significant interest in protecting its citizens from drunk driving. This interest is similar to that reputedly held by the national government. As the studies quoted above at n. 1, p. 47-48, show, it is equally likely that a higher drinking age will offer no relief from driving while intoxicated, and in fact, that a lower drinking age may control youthful drinking. Thus, in addition to protecting its sovereignty, the State asserts that its policy choice is just as likely as the choice of Congress to deter drinking and driving.

Each legislative body has made a choice. The question for this Court, then, is which legislative body had the right to determine

what the State's drinking age shall be. This Court must determine whether the extensive powers granted to the states by the Twenty-first Amendment, as well as the principles and benefits to be gained from federalism, are sufficient to allow the State's choice to prevail in the face of a conflicting national choice. The Court has reached that concrete case where the interests of the State lie at the core of the Twenty-first Amendment and where national interests must give way. 324 Liquor Corp. v. Duffy, 55 U.S.L.W. at 4098; Bacchus Imports Ltd., 468 U.S. at 276-277.

II

THE NATIONAL MINIMUM DRINKING AGE, 23 U.S.C. §158, VIOLATES THE TENTH AMENDMENT, BY DISPLACING THE STATE'S CORE POWER TO SET DRINKING AGES, GRANTED TO THE STATE BY THE TWENTY-FIRST AMENDMENT.

- A. The Tenth Amendment Continues to Limit Congress.

Throughout the history of the United States, there have been varying interpretations of the viability of the Tenth Amendment, United States Constitution, as an independent limit on the authority of Congress. The controversy on this matter has led to a host of decisions in this Court in recent years, culminating in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). Garcia, of course, was decided pursuant to the Commerce Clause, and is not directly relevant in this Spending Clause case. Even Garcia, however, recognizes possible affirmative limits on federal action affecting the states under the Commerce Clause. Id. at 556-557. Thus to the extent Garcia may be applicable, it does not necessarily favor national power in an instance such as the present case, where a

specific delegation of power is present.³ Where the United States Constitution has delegated to the states the specific power to regulate alcohol within their own borders, the Tenth Amendment reinforces the argument of the State in this case.

³The State, of course, does not believe that the limits on national action in protection of state sovereignty set forth in Garcia are sufficient to protect the states. Thus, the State does not object to an overruling of, or limiting of, the Garcia precedent. The State hastens to add, however, that an overruling of Garcia is not necessary for two reasons. First, it was decided pursuant to the Commerce Clause, and in the present case, the national government asserts a Spending Clause power. Second, the intrusion occasioned upon the states' prerogatives by the enactment of 23 U.S.C. §158 is significantly greater than that occasioned by the Fair Labor Standards Act. This is because the Twenty-first Amendment specifically delegates to the states the right to regulate alcohol within their own borders. There is no corresponding federal constitutional power in the State of Texas to establish or regulate urban mass transit authorities, or to hire employees at lower rates of pay or for longer hours than permitted to private employers.

B. The Tenth Amendment Requires that 23 U.S.C. §158 be Invalidated.

Because the power to regulate intoxicating liquors within their borders is specifically delegated to the states, it is not delegated to the national government. The power is not prohibited to the states. Therefore, the direct language of the Tenth Amendment would reserve this power to the states respectively, or to the people.

This application is illustrated in the Spending Power case of Steward Machine Company v. Davis, 301 U.S. 548 (1937). In that case, the Court stated that federal action must be "within the national power and policy" in order not to violate the Tenth Amendment. The particular regulation in that case was found to be within the national power and policy. In the present case, however, the statute is not within the "national power and policy," because the

Twenty-first Amendment has delegated the power to regulate alcohol within the State's borders to the State. The Twenty-first Amendment thus acts as a specific constitutional provision in limit of the Spending Clause.

The State would argue the Constitution left determination of drinking ages to the states, and wisely so. There are probably few products or commodities in commerce that raise local concern in public policy decisions to a greater degree than intoxicating liquors. Means that the states have chosen to regulate intoxicating liquors vary widely, as this Court is aware. Prior to the adoption of 23 U.S.C. §158, drinking ages also varied widely among the states.

As the amici states point out, there is more than one way to address the drinking driver problem. The State of South Dakota has chosen a multifaceted approach. PA

44-45. This program has been quite successful, in spite of the fact that no drinking age of twenty-one has been adopted to this point. The states have traditionally acted as experimental laboratories in the solution of problems, New State Ice Company v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). Many prospective solutions for the problem of drunken driving have come through innovation of the individual states, rather than from federal mandates. It is even possible that a drinking age lower than twenty-one will help solve the problem of drunk driving. This can not be done, however, if the national government imposes its will upon all of the states, and forces them to adopt a federally mandated program that might, or might not, work under all conditions.

Finally, while a particular drinking age might work well in one part of the country,

its establishment on a universal basis may have differing results in differing parts of the country, and may actually be harmful in some. Local legislators are in a better position to determine what will work on a local basis.

It is plain that the framers of the Constitution, and the framers of the Twenty-first Amendment, intended the matter of regulation of alcohol distribution to be primarily local in character. 76 Cong.Rec. 4147 (1933). The Tenth Amendment reinforces the conclusion, drawn from the Twenty-first Amendment, that the national minimum drinking age is unconstitutional.

By adopting 23 U.S.C. §158, Congress clearly overstepped the boundaries that had previously been understood to exist under the Tenth and Twenty-first Amendments. Congress has not previously sought to directly regulate intrastate alcohol sales, or to

structure the liquor distribution system in each of the states in a particular way. Congress directly displaced core powers within Section 2 of the Twenty-first Amendment and usurped unto itself the power denied to it by the Twenty-first Amendment. Congress also exceeded the bounds of the Tenth Amendment by taking unto itself the power not delegated to it and specifically denied to it by the Twenty-first Amendment.

There are good reasons why this, as well as other, powers were reserved to the states by the United States Constitution. It is not necessary, however, to overrule or limit prior case law or to restructure the entire federal system in order for the State to prevail in this case. The Twenty-first Amendment specifically delegates the power to regulate liquor distribution to the states. No other constitutional provision makes a specific delegation to the states. This Court

may protect these specifically delegated powers even if it is disposed to countenance gradual erosion of reserved powers.

It is imperative, however, for the State to prevail in this case if there is to be any effective limitation on the powers of Congress under the Spending Clause. If this Court will not protect the State from usurpation of a specifically delegated power, it is difficult to imagine any judicial limitation on the Spending Power. Without such a judicial limitation, the states are reduced to mere administrative arms of an all powerful national legislature. This was not the intent of the framers of the Constitution, the Tenth Amendment, and the Twenty-first Amendment.

CONCLUSION

For these reasons, the State of South Dakota requests that the decision of the Eighth Circuit Court of Appeals be reversed,

and that the matter be remanded for issuance of appropriate declaratory and injunctive relief as requested in the complaint.

Respectfully submitted,

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January, 1987

RESPONDENT'S BRIEF

MAR 13 1987

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF SOUTH DAKOTA, PETITIONER

v.

ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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48/18

QUESTION PRESENTED

Whether either the Tenth Amendment or the Twenty-first Amendment bars Congress from conditioning a grant of federal highway funds to a state upon the state's adoption of a minimum drinking age of 21.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Summary of argument	10
Argument:	
Section 158 does not violate the Constitution	13
A. Section 158 constitutes a permissible exercise of the spending power	14
B. Section 158 does not violate the Tenth Amendment .	19
C. Section 158 is not invalid under the Twenty-first Amendment	24
1. The Twenty-first Amendment is not implicated where, as here, Congress seeks to encourage a state to impose more stringent restrictions upon the availability of alcoholic beverages	25
2. Section 158 does not violate the Twenty-first Amendment because it does not alter the authori- ty of States to regulate the sale and consumption of alcoholic beverages	31
3. If a constitutional balancing test is required, Sec- tion 158 easily satisfies the relevant standard ...	34
Conclusion	39

TABLE OF AUTHORITIES

Cases:

<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	36, 37
<i>Bennett v. Kentucky Dep't of Education</i> , 470 U.S. 656 (1985)	18
<i>Bowen v. Owens</i> , No. 84-1905 (May 19, 1986)	16
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	15
<i>California v. LaRue</i> , 409 U.S. 109 (1972)	32
<i>California Bankers Ass'n v. Shultz</i> , 416 U.S. 21 (1974) ...	15
<i>California Retail Liquor Dealers Ass'n v. Midcal Alum- inum, Inc.</i> , 445 U.S. 97 (1980)	26, 30, 34, 37
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984) ..	26, 28, 34, 35, 36, 37

IV

Cases—Continued:

Page

<i>City of Newport v. Iacobucci</i> , No. 86-139 (Nov. 17, 1986)	32
<i>City of Springfield v. Kibbe</i> , No. 85-1217 (Feb. 25, 1987)	14
<i>Collins v. Yosemite Park & Curry Co.</i> , 304 U.S. 518 (1938)	32
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	21
<i>Coyle v. Oklahoma</i> , 221 U.S. 559 (1911)	21
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	27, 28, 32
<i>Crawford v. Pittman</i> , 708 F.2d 1028 (5th Cir. 1983)	23
<i>Department of Revenue v. James Beam Co.</i> , 377 U.S. 341 (1964)	32
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982)	22, 24
<i>Finch & Co. v. McKittrick</i> , 305 U.S. 395 (1939)	26
<i>Flemming v. Nestor</i> , 363 U.S. 603 (1960)	17
<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1980)	15, 16
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528 (1985)	9, 22, 24
<i>Helvering v. Davis</i> , 301 U.S. 619 (1937)	15, 16
<i>Hodel v. Virginia Surface Mining & Reclamation Ass'n</i> , 452 U.S. 264 (1981)	23
<i>Hostetter v. Idlewild Bon Voyage Liquor Corp.</i> , 377 U.S. 324 (1964)	26, 34
<i>Indianapolis Brewing Co. v. Liquor Control Comm'n</i> , 305 U.S. 391 (1939)	26, 32
<i>INS v. Cardoza-Fonseca</i> , No. 85-782 (Mar. 9, 1987)	14
<i>Ivanhoe Irrigation District v. McCracken</i> , 357 U.S. 275 (1958)	16, 17
<i>King v. Smith</i> , 392 U.S. 309 (1968)	15, 19
<i>Larkin v. Grendel's Den, Inc.</i> , 459 U.S. 116 (1982)	32
<i>Lau v. Nichols</i> , 414 U.S. 563 (1974)	15, 16, 19, 21
<i>Lawrence County v. Lead-Deadwood School Dist. No. 40-1</i> , 469 U.S. 256 (1985)	15, 19
<i>Leisy v. Hardin</i> , 135 U.S. 100 (1890)	27
<i>Massachusetts v. Mellon</i> , 262 U.S. 447 (1923)	20
<i>Massachusetts v. United States</i> , 435 U.S. 444 (1978)	16
<i>National League of Cities v. Usery</i> , 426 U.S. 833 (1976) ..	22, 23
<i>New Hampshire Dep't of Employment Security v. Marshall</i> , 616 F.2d 240 (1st Cir.), appeal dismissed, 449 U.S. 806 (1980)	21, 23

V

Cases—Continued:

Page

<i>New York State Liquor Authority v. Bellanca</i> , 452 U.S. 714 (1981)	32
<i>North Carolina ex rel. Morrow v. Califano</i> , 445 F. Supp. 532 (E.D.N.C. 1977), aff'd mem., 435 U.S. 962 (1978) ..	24
<i>Oklahoma v. Civil Service Comm'n</i> , 330 U.S. 127 (1947) ..	9, 15, 19, 21
<i>Oklahoma v. Schweiker</i> , 655 F.2d 401 (D.C. Cir. 1981) ..	21, 23
<i>Pennhurst State School v. Halderman</i> , 451 U.S. 1 (1981) ..	16, 20
<i>Rhodes v. Iowa</i> , 170 U.S. 412 (1898)	27
<i>State Board of Equalization v. Young's Market</i> , 299 U.S. 59 (1936)	26
<i>Steward Machine Co. v. Davis</i> , 301 U.S. 548 (1937)	15, 16, 20, 21
<i>324 Liquor Corp. v. Duffy</i> , No. 84-2022 (Jan. 13, 1987) ..	26, 29, 30, 32, 33, 34, 35, 37, 38
<i>United States v. Butler</i> , 297 U.S. 1 (1936)	15, 16
<i>United States v. Lanza</i> , 260 U.S. 377 (1922)	28
<i>United States v. State Tax Commission</i> , 412 U.S. 363 (1973)	32
<i>United States v. Tax Comm'n</i> , 421 U.S. 599 (1975)	32
<i>Walker Field Public Airport Authority v. Adams</i> , 606 F.2d 290 (10th Cir. 1979)	23
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971)	32
<i>William Jameson & Co. v. Morgenthau</i> , 307 U.S. 171 (1939)	26

Constitution, statutes, regulation, and rule:

U.S. Const.:

Amend. I	16, 32
Amend. V (Due Process Clause)	32
Amend. X	passim
Amend. XIV (Equal Protection Clause)	32
Amend. XVIII	28, 29
Amend. XXI	passim
§ 1	28
§ 2	passim
§ 3	29, 30

Art. I, § 8:

Cl. 1 (Spending Clause)	passim
Cl. 3 (Commerce Clause)	25, 28, 29, 32, 33, 34
Cl. 17	32

VI

Statutes, regulation, and rule — Continued:	Page
Act of July 17, 1984, Pub. L. No. 98-363, § 6, 98 Stat. 437-438 (codified at 23 U.S.C. (Supp. III 158))	4
Federal Alcohol Administration Act of 1935, ch. 814, 49 Stat. 977 <i>et seq.</i>	30
Webb-Kenyon Act, ch. 90, 37 Stat. 699-700 (codified at 27 U.S.C. 122)	27, 28
Wilson Act, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. 121)	27
Pub. L. No. 99-272, § 4104, 100 Stat. 114-115 (to be codified at 23 U.S.C. 158)	4
20 U.S.C. 352 <i>et seq.</i>	18
20 U.S.C. 355b	18
20 U.S.C. 801 <i>et seq.</i>	18
20 U.S.C. 1000 <i>et seq.</i>	18
20 U.S.C. 3861	18
20 U.S.C. 101(b)	11, 17
20 U.S.C. (Supp. III) 158	<i>passim</i>
20 U.S.C. (Supp. III) 158(c)	7
29 U.S.C. 794	18
29 U.S.C. 1501 <i>et seq.</i>	18
42 U.S.C. 291c(e)	18
42 U.S.C. 2000d	18
42 U.S.C. 4151	18
42 U.S.C. 6101	18
S.D. Codified Laws Ann. (1986):	
§ 35-4-78	37
§ 35-6-27	7
Exec. Order No. 12358, 3 C.F.R. 179 (1983)	2
Sup. Ct. R. 21.1(a)	14
Miscellaneous:	
49 Cong. Rec. (1913):	
4291-4292	28
4299	28
4447	28

VII

Miscellaneous — Continued:	Page
H.R. Rep. 1461, 62d Cong., 3d Sess. (1913)	27
76 Cong. Rec. (1933):	
p. 4138	29
p. 4141	28
p. 4144	29
p. 4147	30
130 Cong. Rec. H5395-H5407 (daily ed. June 7, 1984) ...	6
130 Cong. Rec. H7220-H7223 (daily ed. June 27, 1984) ..	6
130 Cong. Rec. (daily ed. June 26, 1984):	
p. S8207	4, 5
p. S8208	5
p. S8209	4
p. S8212	4, 5
p. S8214	4, 5
p. S8217	4
p. S8219	5
p. S8223	6
p. S8225	5
p. S8228	5
p. S8231	5
p. S8234	6
p. S8246	5
<i>Measures to Combat Drunk Driving: Hearing Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation, 98th Cong., 2d Sess. (1984)</i>	3
<i>National Minimum Drinking Age: Hearing Before the Subcomm. on Alcoholism and Drug Abuse of the Senate Comm. on Labor and Human Resources, 98th Cong., 2d Sess. (1984)</i>	3
<i>National Minimum Drinking Age Law: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 99th Cong., 2d Sess. (1986)</i>	6
Presidential Commission on Drunk Driving, <i>Final Report</i> (1983)	2, 3

VIII

Miscellaneous — Continued:

Page

<i>Prohibit the Sale of Alcoholic Beverages to Persons Under 21 Years of Age: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. (1983)</i>	3
S.D. H.R. Bill 1345 (1987)	7
18 Weekly Comp. of Pres. Doc. (Apr. 4, 1982)	1
20 Weekly Comp. Pres. Doc. (July 17, 1984)	6

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OCTOBER TERM, 1986

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A23) is reported at 791 F.2d 628. The opinion of the district court (Pet. App. A24-A38) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A39) was entered on May 21, 1986. The petition for a writ of certiorari was filed on August 18, 1986, and was granted on December 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1982, President Reagan, noting that "half of all automobile deaths involve drunk drivers" (18 Weekly Comp. of Pres. Doc. 475 (Apr. 14, 1982)), established a Presidential Commission on Drunk Driving to investigate

the problem and recommend solutions (Exec. Order No. 12358 (1982), 3 C.F.R. 179 (1983)). The Commission issued a report approximately 18 months later. It found that between 1973 and 1983, "250,000 Americans * * * tragically lost their lives in alcohol-related crashes. Conservative estimates place the annual economic loss at \$21 billion, while others run as high as \$24 billion. There is, of course, no way to measure the loss of human lives" (Presidential Commission on Drunk Driving, *Final Report 1* (1983) [hereinafter cited as *Presidential Commission Report*]).

The Commission concluded that action by government, as well as by private citizens and corporations, was needed to "reduce the carnage caused by driving under the influence [of alcohol]" (*Presidential Commission Report 2*). It emphasized that "public officials at all levels of government must take action to eliminate or reduce the public health hazard of driving under the influence and should be primarily responsible for assuring legal and judicial innovation and program implementation" (*ibid.*). The Report set forth a number of recommendations for action (*id.* at 6-23).

The Commission made two major findings that are directly relevant to state laws establishing minimum legal drinking ages. First, the Commission found "evidence of a direct correlation between the minimum drinking age and alcohol-related crashes among the age groups affected. Studies have shown that raising the legal drinking age produced an average annual reduction of 28 percent in nighttime fatal crashes involving affected 18- to 21-year-old drivers. One of the studies indicated that if all remaining States raised the legal drinking age to 21, there would be 730 fewer young persons killed annually on United States highways" (*Presidential Commission Report 10*). Second, the Commission observed that although 19 states had adopted a minimum drinking age of 21, the lack of uni-

formity among the states resulted in "an incentive to drink and drive" because "young persons commut[ed] to border States where the drinking age is lower" (*id.* at 11). It concluded that "[t]here is simply no way to adequately address the needless tragedies caused by young persons commuting to border States except by establishing a uniform drinking age among the States" (*ibid.*).

On the basis of these findings, the Commission recommended that the states "immediately adopt 21 years as the minimum legal purchasing and public possession age for all alcoholic beverages" (*Presidential Commission Report 10*). The Commission also recommended that Congress enact a statute conditioning the Secretary of Transportation's approval of federally funded highway projects within a state upon the state's adoption of a minimum drinking age of 21 (*ibid.*).

Congress has also devoted attention to the drunk driving problem, holding hearings to gather information and consider possible solutions. Testimony at these hearings supported the Commission's findings regarding the lethal interstate consequences of the lack of uniformity in state minimum drinking ages. See, e.g., *National Minimum Drinking Age: Hearing Before the Subcomm. on Alcoholism and Drug Abuse of the Senate Comm. on Labor and Human Resources*, 98th Cong., 2d Sess. 2-20, 23-41 (1984); *Measures to Combat Drunk Driving: Hearing Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. 7-12, 12-21 (1984); *Prohibit the Sale of Alcoholic Beverages to Persons Under 21 Years of Age: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 239-261, 261-276, 427, 449 (1983).

As a result of these studies, Congress in 1984 adopted Section 158 of Title 23, which directs the Secretary of

Transportation to withhold a portion of the federal funds that would otherwise be apportioned to a state for highway construction if the state permits "the purchase or public possession * * * of any alcoholic beverage" by a person less than 21 years of age. Act of July 17, 1984, Pub. L. No. 98-363, § 6, 98 Stat. 437 (codified at 23 U.S.C. (Supp. III) 158). The statute provided for a grace period of two years — fiscal years 1985 and 1986 — in which federal highway grants would not be reduced. It directs the withholding in fiscal year 1987 of 5% of the funds that otherwise would be apportioned to a state under certain highway grant programs; in subsequent years, 10% of such funds are to be withheld. Pub. L. No. 99-272, § 4104, 100 Stat. 114-115 (to be codified at 23 U.S.C. 158). If a state subsequently adopts a 21-year minimum drinking age, it may be entitled to recoup funds withheld in fiscal years 1987 and 1988 (*ibid.*).

Section 158 originated as an amendment proposed on the floor of the Senate. The principal sponsors of the amendment, Senators Danforth and Lautenberg, emphasized that a uniform minimum drinking age of 21 would "significantly reduce the drunk driving problem" (130 Cong. Rec. S8207 (daily ed. June 26, 1984) (remarks of Sen. Danforth)). Senator Lautenberg observed that drunk driving is the leading cause of death among teenagers, resulting in half of all deaths in that age group; that "[t]eenagers make up 10 percent of licensed drivers, but account for 21 percent of alcohol-related fatalities"; and that the states that had raised the drinking age to 21 had experienced a significant reduction in drunk driving deaths among teenagers. *Id.* at S8209; see also *id.* at S8212 (remarks of Sen. Pell); *ibid.* (remarks of Sen. Heinz); *id.* at S8214 (remarks of Sen. Specter).

The legislators stated that the adoption of Section 158 would address what they found to be "the interstate problem of varying drinking age" (130 Cong. Rec. S8217

(daily ed. June 26, 1984) (remarks of Sen. Lautenberg)). As Senator Danforth observed, "some States now have a 21-year-old drinking age, some States have an 18-year-old drinking age, and those who go from the higher — namely the 21 — to the lower age States in order to get a drink have today, through this patchwork [of different minimum drinking ages], an incentive to both drink and drive." *Id.* at S8219; see also *id.* at S8212 (remarks of Sen. Heinz) ("[t]his issue is truly a national one demanding congressional action because we are faced in some States with situations where a State has a 21-year-old drinking limit, but an adjacent State does not. The result is that we end up with blood borders where young people drive over the State line to get alcohol"); *id.* at S8214 (remarks of Sen. Specter); *id.* at S8228 (remarks of Sen. Mitchell).

The sponsors of the measure made clear that it was designed to "encourage" states to adopt laws that would be uniform in this respect by imposing a condition on a modest portion of the federal highway funds granted to a state. See 130 Cong. Rec. S8207 (daily ed. June 26, 1984) (remarks of Sen. Danforth); *id.* at S8208 (remarks of Sen. Lautenberg); see also *id.* at S8225-S8226 (remarks of Sen. Mathias) (noting that the legislation did not "require[] any state to make any changes in its laws relating to drinking" and that "it is perfectly proper for Washington to encourage States to do more to make our streets and highways safer, and to provide that encouragement through specific conditions on the spending power"); *id.* at S8231 (remarks of Sen. Exon) ("[w]e are simply saying to the States: 'If you see [fit] not to come into compliance with this law, you will lose a rather small proportion of the rather generous amount of money that comes from the Federal Government to improve and keep your highways and bridges in shape' ").¹

¹ Opponents of Section 158, by contrast, characterized the provision as coercive. See, e.g., 130 Cong. Rec. S8246 (daily ed. June 26,

In his remarks upon signing into law the bill that contained Section 158, President Reagan emphasized that the drunk driving problem "is bigger than the individual States. It's a grave national problem and it touches all our lives" (20 Weekly Comp. Pres. Doc. 1036 (July 17, 1984)). He observed that "[n]early every State that has raised the drinking age to 21 has produced a significant drop in the teenage driving fatalities," but noted that the fact that all states had not adopted that drinking age "leaves us with a crazy-quilt of different States' drinking laws and far too many blood borders, borders where teens drive across to reach States with lower drinking ages. And these teenagers drink and then careen home and all too often cause crippling or fatal accidents" (*id.* at 1035, 1036). The President concluded that Section 158 was "a judicious use of Federal power" that "will help persuade State legislators to act in the national interest to save our children's lives" (*id.* at 1036).²

1984) (remarks of Sen. Thurmond); *id.* at S8234 (remarks of Sen. Pressler); *id.* at S8223 (remarks of Sen. Symms).

The House of Representatives had previously adopted virtually identical legislation, and it quickly passed the bill that contained Section 158. See 130 Cong. Rec. H7220-H7223 (daily ed. June 27, 1984). The debate on the earlier House bill indicates that its purposes were the same as those of the amendment adopted by the Senate (130 Cong. Rec. H5395-H5407 (daily ed. June 7, 1984)).

² The conclusions reached by Congress and the President regarding the effectiveness of a minimum drinking age of 21 in reducing highway fatalities have been confirmed by a recent General Accounting Office study regarding the relationship between the minimum drinking age and highway safety. The study found that "raising the drinking age has, in fact, had direct, significant effects on reducing traffic accidents among the affected age groups, typically 18- to 20-year-olds, on average across the States." *National Minimum Drinking Age Law: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 99th Cong., 2d Sess. 5* (1986) (testimony of Eleanor Chelimsky); see also *id.* at 4-40 (testimony regarding GAO study).

2. South Dakota permits persons 19 years of age and older to purchase beer containing up to 3.2 percent alcohol (S.D. Codified Laws Ann. § 35-6-27 (1986)); it has not changed that rule since the enactment of Section 158.³ Fearing a reduction of its federal grant funds, petitioner commenced this action against the Secretary of Transportation in the United States District Court for the District of South Dakota. It sought a declaration that Section 158 is unconstitutional and an order barring the Secretary from withholding highway construction funds from states that fail to adopt a minimum drinking age of 21 (see Pet. App. A41-A51). The district court granted the Secretary's motion to dismiss, rejecting petitioner's claims that Section 158 is invalid because it violates the Tenth and Twenty-first Amendments (*id.* at A24-A38).

The court of appeals unanimously affirmed (Pet. App. A2-A23). The court of appeals held that Section 158 is a valid exercise of Congress's power under the Spending Clause. It observed that this power "is quite expansive and without question includes the authority to attach conditions to the receipt and further expenditure of federal funds" (Pet. App. A7-A8 (citation omitted)). The court noted that in legislating under the Spending Clause, Congress must seek to advance the general welfare and that "any conditions imposed by Congress must be reasonably related to the national interest Congress seeks to advance" (*id.* at A8). But the court found that Section 158 easily

³ Low alcohol beer is an "alcoholic beverage" within the meaning of Section 158 (see 23 U.S.C. (Supp. III) 158(c)). It is also an "intoxicating liquor" within the meaning of the Twenty-first Amendment.

Both houses of the South Dakota legislature have passed a bill raising the minimum drinking age for low alcohol beer to 21, effective April 1, 1988 (see House Bill 1345 (1987)); as far as we are aware, the Governor has not yet taken any action with respect to this measure. The bill provides that the new minimum drinking age will automatically be repealed in the event Section 158 is found to be unconstitutional.

satisfies these requirements (Pet. App. A12-A13):

We believe Congress reasonably could have concluded the problem of young adults drinking and driving is not a purely local or intrastate concern but rather is a concern of interstate and national proportions. We further believe Congress, in its reasoned discretion, could determine that a uniform minimum drinking age would lessen that problem and improve the safety of our nation's highways for all Americans. Finally, we conclude Congress's decision to condition a portion of a state's federal highway funds on the adoption of a minimum drinking age of twenty-one is reasonably related to Congress's interest in achieving a nationally uniform minimum drinking age.

The court of appeals then turned to petitioner's claim that Section 158 violates affirmative limitations upon Congress's authority contained in Section 2 of the Twenty-first Amendment, which provides that "the transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The court rejected petitioner's assertion that this language grants the states "all encompassing and exclusive * * * authority" (Pet. App. A14) to regulate the use of alcoholic beverages. The court held, rather, that "the twenty-first amendment was intended to effect a much narrower grant of authority. Specifically, the primary intent of the twenty-first amendment was to authorize the State (where it would otherwise be prohibited from doing so) to regulate directly the transportation or importation of liquor into the state, in effect, to create 'an exception to the normal operation of the Commerce Clause' " (Pet. App. A16 (citations omitted)).

The court stated that state regulatory authority over alcoholic beverages flows not from the Twenty-first Amendment but rather from state police power (Pet. App. A15); and that "the state's power to regulate liquor is not

exclusive" because Congress "retains its authority under the Commerce Clause to regulate interstate commerce in liquor" (*id.* at A17). The court of appeals concluded that Congress had the affirmative authority to adopt Section 158 because the Twenty-first Amendment "did not limit or withdraw Congress's ability to exercise authority under its existing delegated powers, including the spending power" (Pet. App. A18).

The court of appeals next concluded that Section 158 could not be invalidated on the theory that it conflicted with South Dakota's law permitting 19-year-olds to buy beer. The court acknowledged that, "in the area of alcohol regulation, when state and federal law directly conflict, a balancing of the state and federal interests involved may result in state law prevailing over a conflicting federal enactment" (Pet. App. A18). But the court held that this principle applies only where "the two laws * * * actually conflict," and it concluded that "no conflict exists" here (*id.* at A19). Because Section 158 "necessarily recognizes the State's power to reject Congress's judgment and adopt and legally maintain any drinking age it chooses," the court noted, "South Dakota is entirely free to maintain its law as it now exists and will violate no federal law if it chooses to do so" (Pet. App. A19-A20).

Finally, the court of appeals determined that Section 158 does not violate the Tenth Amendment. Relying upon *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127 (1947), the court held that the Tenth Amendment is not violated when Congress attaches conditions to grants of federal funds. "[T]o the extent a state finds the conditions attached by Congress distasteful," the court said, "the state has available to it the simple expedient of refusing to yield to what it urges is 'federal coercion' " (Pet. App. A21 (citation omitted)). The court of appeals also noted (*id.* at A21-A22) that the State's Tenth Amendment argument was "further undermined" by this Court's decision in

Garcia v. San Antonio Metropolitan Transit Authority,
469 U.S. 528 (1985).

SUMMARY OF ARGUMENT

Grants of federal funds helped the states to build highways that permit high-speed interstate automobile travel. An unfortunate collateral consequence of that federal program was to make it much easier for young people living in a state where the minimum drinking age is 21 to drive to and from neighboring states where alcohol is legally available to them. Such interstate travel by young people in search of alcohol all too frequently leads to accidents, both on federally funded highways and on other roads, that cause death and serious injury. Congress and President Reagan, finding that differences in state minimum drinking ages create "blood borders" that induce such interstate automobile travel by young people, concluded that Section 158 would be a "judicious use of Federal power" to encourage the states to eliminate blood borders by adopting a uniform minimum drinking age.

Section 158 does not deny or limit the authority of the states to regulate the sale or use of alcoholic beverages within their borders. To the contrary, it proceeds from the assumption that the states alone will continue to exercise this authority. But it encourages the elimination of one instance of nonuniformity of state regulation that has proved to be lethal by imposing, on a modest portion of the funds available to a state under federal highway grant programs, the condition that the state maintain or adopt a minimum drinking age of 21. Section 158 is, we submit, a valid condition on an exercise of the Spending Power that violates neither the Tenth Amendment nor the Twenty-first Amendment.

The petition for a writ of certiorari did not present the question whether Section 158 falls within Congress's power under the Spending Clause to impose conditions

upon grants of federal funds. Since that question was decided below and is argued extensively by amici in this Court, we nevertheless address it and argue that the clear answer is yes. Section 158 promotes the general welfare by combatting a problem that is both national in scope and interstate in character—drunk driving by teenagers crossing state lines in search of alcohol. The conclusion of Congress and the President that a uniform minimum drinking age of 21 would reduce interstate drunk driving by young people was plainly a reasonable one. Section 158 also bears an appropriate relation to the grant program to which is it attached: although one of the express purposes of that program is highway safety (see 23 U.S.C. 101(b)), federally funded highways make it easier for young people to reach and cross state lines in search of alcohol, and such highways are themselves made unsafe by teenage drunk drivers returning from states where they are permitted to drink.

Section 158 does not violate the Tenth Amendment. This Court has long held that a condition imposed upon a federal grant pursuant to a valid exercise of the Spending Power cannot contravene the reserved rights of the states under the Tenth Amendment as long as the grant is not coercive and the state therefore has the "simple expedient" of declining both the grant and the condition. There is no basis for finding coercion here because the effect of Section 158 is quite limited. If a state chooses to maintain a minimum drinking age of less than 21, Section 158 provides for at most a 10% reduction in the funds otherwise available to the state under federal highway grant programs. This minor reduction in federal aid simply does not amount to coercion; the state retains the ability to decide for itself whether to forego the funds rather than comply with the condition.

Section 158 does not violate the Twenty-first Amendment for three separate reasons. First, the Amendment

does not reach this case at all. By its terms, it prohibits transportation, importation, delivery, or use of alcoholic beverages in violation of state law. Section 158 neither requires nor encourages any such activity, nor does it encourage any state to modify its law to legalize any transportation, importation, delivery or use previously prohibited.

Second, Section 158 does not reduce the states' authority to regulate drinking. It presumes that they will continue to do so and merely encourages uniformity in one respect in order to alleviate a problem that is beyond the reach of any one state acting alone. There is no indication in the language or history of the Amendment that it was intended to prevent the federal government from encouraging the states, in a manner that passes muster under the Spending Clause and the Tenth Amendment, to exercise their acknowledged authority over alcohol in a particular way. Since Section 158 passes muster under the Tenth Amendment as a noncoercive exercise of the Spending Power, it does not violate the Twenty-first Amendment.

Finally, if the Court deems it appropriate to develop a balancing test to determine whether an exercise of the Spending Power violates the Twenty-first Amendment (as it has for exercises of the Commerce Power), it is clear that the national interest in eliminating blood borders substantially exceeds South Dakota's interest in being able both to permit its own and neighboring states' young people to drink low alcohol beer and to receive the last ten percent of its federal highway grants. Especially because Section 158 does not eliminate the state's freedom of choice, but simply provides an incentive that the state is free to decline, the balance of interests favors the constitutionality of Section 158.

ARGUMENT

SECTION 158 DOES NOT VIOLATE THE CONSTITUTION

Congress and the President concluded in 1984 that drunk teenagers were responsible for a large number of deaths on the Nation's highways, and that drunk driving by teenagers was actually encouraged by differences in minimum drinking ages in different states. In order to encourage states, which are principally responsible for regulating the sale and consumption of alcohol within their borders, to eliminate what it and the President concluded was a lethal nonuniformity in one feature of state regulation, Congress enacted Section 158, which conditions a small portion of the federal funds available to each state for highway construction—five percent of certain programs in fiscal year 1987 and ten percent in subsequent years—upon the state's adoption of a minimum drinking age of 21.

Petitioner asserts that Section 158 violates limitations on Congress's authority imposed by the Tenth and Twenty-first Amendments and that, therefore, although petitioner declines to comply with the condition set forth in Section 158, it is nonetheless entitled to the federal funds that Congress has tied to this condition. But nothing in the Constitution prohibits Congress from seeking to alleviate a serious problem of national scope—drunk driving by teenagers on the Nation's highways, a problem that stems in significant part from interstate travel by youths in search of a lower legal drinking age—by encouraging through the mild incentive contained in Section 158 the adoption of a uniform minimum drinking age. This condition on a grant of federal funds serves a proper purpose and is reasonable and noncoercive. It does not impinge in any way on the state interests protected by the Twenty-first Amendment.

A. Section 158 Constitutes A Permissible Exercise Of The Spending Power

1. The court of appeals held that, putting to one side petitioner's claims under the Tenth and Twenty-first Amendments, Section 158 is a valid exercise of Congress's power under the Spending Clause (Pet. App. A8-A13). Petitioner did not seek review by this Court of that determination. The questions presented in the petition for a writ of certiorari are limited to the validity of Section 158 under the Tenth and Twenty-first Amendments (see Pet. i). And petitioner does not argue in its brief on the merits that Section 158 violates any limitation upon congressional authority imposed by the Spending Clause. See Pet. Br. 52 ("[t]he State has never contended that the congressional action was unreasonable, or unrelated to a national concern in the absence of the Twenty-first Amendment"). We believe that petitioner's decision not to seek review of that determination forecloses any dispute about the Spending Clause in this Court.⁴

Some of the amici supporting petitioner have independently raised a Spending Clause challenge to the validity of Section 158. This Court's rules preclude consideration of a constitutional challenge raised by an amicus that was not presented in the petition. Sup. Ct. R. 21.1(a) ("[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court"); see *INS v. Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 27 n.32. This is especially true where, as here, the party supported by the amicus has expressly declined to present the issue for review. We nevertheless briefly discuss the justifications for the court of appeals' ruling.

⁴ In addition, the Spending Clause question, while considered by the court of appeals, was not raised by either party below. The Court generally does not consider questions in that posture. See *City of Springfield v. Kibbe*, No. 85-1217 (Feb. 25, 1987), slip op. 2.

2. The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defence and general welfare of the United States" (Art. I, § 8, Cl. 1). This Court has repeatedly recognized the breadth of this grant of authority to spend federal funds, observing that "[i]t is for Congress to decide which expenditures will promote the general welfare: '[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative powers found in the Constitution.' Any limitations upon the exercise of that granted power must be found elsewhere in the Constitution." *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (citation omitted); see also *Helvering v. Davis*, 301 U.S. 619, 640-641 (1937); *United States v. Butler*, 297 U.S. 1, 66 (1936).

Congress's broad authority under the Spending Clause is not limited to selecting the purposes for which federal funds may be expended. "It is far from a novel proposition that pursuant to its powers under the Spending Clause, Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar." *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256, 269-270 (1985) (footnote omitted); see also *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.), *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 50 (1974); *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968); *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 144 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548, 590-591 (1937). And the Court has held that Congress may impose conditions upon federal grants that are not justified by reference to another of Congress's enumerated powers. *Oklahoma v. Civil Service Comm'n*, 330 U.S. at 142-143.

To be sure, Congress's power under the Spending

Clause is not unlimited.⁵ First, Congress may only exercise the Spending Power to promote the general welfare; it may not act merely to further a narrow or localized interest. Thus, a reviewing court must consider whether the congressional action furthers the general public interest. See *Bowen v. Owens*, No. 84-1905 (May 19, 1986), slip op. 5; *Helvering v. Davis*, 301 U.S. at 640; *United States v. Butler*, 297 U.S. at 67.

Second, there are limits on the objectives that may be sought to be achieved through conditions to federal grants, although the Court has several times declined to define categorically what those limits are. See *Fullilove v. Klutznick*, 448 U.S. at 474 (opinion of Burger, C.J.); *Lau v. Nichols*, 414 U.S. at 569; cf. *Steward Machine Co. v. Davis*, 301 U.S. at 590-591. One theme, however, is that the condition must bear an appropriate relationship to the purposes of the spending program to which it is attached. See *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion) ("the Federal Government may impose appropriate conditions on the use of federal property or privileges and may require that state instrumentalities comply with conditions that are reasonably related to the federal interest in particular national projects or programs"); *Ivanhoe Irrigation District v. McCracken*,

⁵ In addition to the limitations discussed in the text, a particular grant condition may be limited by other provisions of the Constitution. When the condition is imposed on a grant to a State, for example, Congress's authority may be limited by the Tenth Amendment. See pages 19-24, *infra*. When the condition is imposed on a grant to an individual, other constitutional guarantees, such as the First Amendment, may be implicated. Moreover, at least with respect to grants to a state, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" (*Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981) (footnote omitted)). The last requirement needs no discussion here, however, because there can be no claim that the condition imposed by Section 158 is in any way unclear.

357 U.S. 275, 295 (1958) (same); cf. *Fleming v. Nestor*, 363 U.S. 603, 611 (1960).

The condition set forth in Section 158 promotes the general welfare. Congress reasonably concluded that drunk driving poses a significant threat to safety on the Nation's highways. It also concluded that differences in the minimum drinking ages in state drinking laws encourage young people to cross state lines to obtain alcoholic beverages, and because they frequently return to their home states by car shortly after drinking elsewhere, these differences in state laws lead directly to increased interstate drunk driving. Congress concluded, as did President Reagan, that the problem of "blood borders" is an interstate problem and that, while regulation of drinking is primarily a state matter, encouraging states to eliminate this instance of nonuniformity would be "a judicious use of Federal power."

Far from being a police power measure randomly attached to a spending program, as amici suggest, Section 158 is a direct attempt to achieve one of the purposes—and to combat a problem that is in part a collateral consequence—of the major federal program to which it is attached. One of the express purposes of federal funding is "to increase the safety of [federally funded highway] systems to the maximum extent" (see 23 U.S.C. 101(b)). Paradoxically, however, federally funded highways make it easier for young people to cross state borders by automobile in search of alcohol, a search that all too often leads to serious accidents on federally funded highways and other roads. Section 158 is, we submit, an appropriate means to encourage states to act to eliminate a nonuniformity that creates an incentive to this misuse of the asset being funded.

Amici National Conference of State Legislators, et al. (NCSL) argue that Congress's authority to impose conditions under the Spending Clause is limited to conditions

that "specif[y] in some way how the [federal] money should be spent" (Br. 20). But that rule, if it is meant literally, is plainly too narrow.⁶ For example, when Congress provides a percentage of the funds for an activity, it frequently finds it necessary and proper to specify how the *other* funds for the activity will be spent.⁷ When Congress provides funds to build a special-purpose building, it may require that the building *continue* to be used for the specified purpose even though it is not funding any continuing activity.⁸ And Congress has imposed safety and antidiscrimination and handicapped-access conditions on work projects constructed with federal funds even though such conditions do not direct the use of the federal funds.⁹ By analogy, it seems clear that Congress may condition federal highway grants on the recipient state's denying

⁶ NCSL argues that a condition that goes beyond "specifying how the money should be spent" is "not a condition, but a regulation" (Br. 20), but on that point NCSL is simply wrong. A "regulation" is a legal rule that mandates compliance with specified standards of conduct. Grant conditions that do not satisfy NCSL's test remain simply grant conditions: the prospective recipient of federal funds still has the choice of foregoing the grant rather than conforming to the condition.

⁷ See, e.g., 20 U.S.C. 352 *et seq.* (federal aid for public libraries); 20 U.S.C. 801 *et seq.* (community development training program); 20 U.S.C. 1001 *et seq.* (assistance for higher education); 29 U.S.C. 1501 *et seq.* (job training partnership funds). Indeed, "maintenance of effort" provisions, which prohibit grant recipients from using federal funds in place of local expenditures, are a standard feature of many federal grant programs. See, e.g., 20 U.S.C. 3861 (education block grants); *Bennett v. Kentucky Dep't of Education*, 470 U.S. 656, 670-673 (1985) (discussing similar provision).

⁸ See, e.g., 20 U.S.C. 355b (assistance for construction of public libraries); 42 U.S.C. 291c(e) (assistance for hospital construction).

⁹ See, e.g., 29 U.S.C. 794 (prohibiting discrimination on the basis of handicap); 42 U.S.C. 2000d (prohibiting discrimination on the basis of race, color, or national origin); 42 U.S.C. 4151 (requiring handicapped access for certain buildings constructed with federal funds); 42 U.S.C. 6101 (age discrimination).

alcoholic beverages to teenagers, who are likely to use highways constructed with federal funds to cross state lines in search of alcohol. In each of these cases, including the present one, there is a direct and strong relationship between the purposes of the federal exercise of the Spending Power and the imposition of the condition even though the condition does not itself direct the spending of the federal money.

B. Section 158 Does Not Violate The Tenth Amendment

This Court has made clear that Congress may attach some conditions to grants of federal funds to the states that it could not impose as direct regulations under any of its other enumerated powers. See, e.g., *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. at 269-270; *Lau v. Nichols*, 414 U.S. at 569; *King v. Smith*, 392 U.S. at 333 n.34; *Oklahoma v. Civil Service Comm'n*, 330 U.S. at 142-144. The Court has repeatedly suggested that the Tenth Amendment bars Congress from exercising the Spending Power to force a state to comply with a federal rule that Congress could not impose directly; but such a grant condition is permissible as long as the state has the genuine option of avoiding the condition by rejecting the grant of federal funds.

In *Oklahoma v. Civil Service Comm'n*, *supra*, for example, the Court rejected the claim that a condition upon a federal grant—the requirement that state employees administering federal funds be subject to the standards set forth in the Hatch Act—had a "coercive effect" that "interfer[ed] with the reserved powers of the state" (330 U.S. at 142). The Court observed that the mere fact that "the action taken by Congress does have an effect upon certain activities within the state" was not enough to implicate the Tenth Amendment because "Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion." *Id.* at 143-144; see also *Steward*

Machine Co. v. Davis, 301 U.S. at 590 (rejecting a Tenth Amendment challenge because the Court "[could] not say that [the state] was acting not of her unfettered will, but under the strain of a persuasion equivalent to undue influence" when it complied with the federally-imposed condition); *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923) (observing with respect to a condition on a federal grant that "the statute [did not] require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding").

The Court has characterized legislation enacted pursuant to the Spending Clause as "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'" (*Pennhurst State School v. Halderman*, 451 U.S. at 17). The contract analogy confirms that the relevant inquiry under the Tenth Amendment is whether the state has a genuine option of declining the grant and the condition—the Tenth Amendment can be violated only if Congress has exercised the Spending Power in a manner that precludes the state from making that choice.

A grant condition is not coercive simply because the potential loss of federal funds has some tendency to influence the state's decision to accede to the condition. The possible loss of federal aid is undoubtedly a consideration in a state's decision in virtually every case such as this. As the Court observed in *Steward Machine Co. v. Davis*, *supra*, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties" (301 U.S. at 589-590). The question is whether there is "the exertion of a power akin to undue influence" so that "pres-

sure turns into compulsion, and ceases to be inducement" (*ibid.*).

Judged in these terms, Section 158 cannot be characterized as coercive. To the contrary, the effects of Section 158 are quite limited. The statute provides for no reduction in federal highway grants for two years, a 5% decrease the following year, and a 10% decrease in subsequent years. A minor reduction in federal aid does not deprive the state of the genuine option of foregoing the funds rather than complying with the condition. See, e.g., *Lau v. Nichols*, *supra* (Court upheld condition where condition was tied to entire amount of federal grant); *Oklahoma v. Civil Service Comm'n*, *supra* (same); *Oklahoma v. Schweiker*, 655 F.2d 401, 413-414 (D.C. Cir. 1981) (collecting cases).¹⁰

¹⁰ Petitioner asserts (Br. 50-51, 53-54) that the existence of coercion is a question of fact and that it is entitled to adduce evidence showing that it will be coerced into complying with the statutory condition. As a threshold matter, petitioner's complaint did not allege the existence of coercion (see Pet. App. A41-A51); in the absence of such an allegation, the issue may be resolved against petitioner on a motion to dismiss. More fundamentally, petitioner misapprehends the nature of the inquiry under the Tenth Amendment. The question of coercion is not a question of fact in each particular case but turns upon an assessment of the effect of the federal statute upon the relationship between the states and the federal government. An individualized state-by-state inquiry is neither necessary nor appropriate. *Oklahoma v. Schweiker*, 655 F.2d at 414; *New Hampshire Dep't of Employment Security v. Marshall*, 616 F.2d 240, 246 (1st Cir.), appeal dismissed, 449 U.S. 806 (1980); cf. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627-628 (1981) (validity of state tax under the Commerce Clause does not depend upon individualized factual inquiry); *Coyle v. Oklahoma*, 221 U.S. 559 (1911) (finding coercion where condition was imposed upon Oklahoma's admission as a state).

Amici National Beer Wholesalers' Association et al. intimate (Br. 20-21 & n.13) that Congress intended to compel the States to adopt a minimum drinking age of 21. See also NCSL Br. 9-10, 14. The legis-

Indeed, a contrary conclusion would call into question the validity of virtually every grant condition that Congress would not have had the power to impose as a direct regulation under one of its other enumerated powers, because in almost every case failure to comply with a grant condition may result in the loss of some funds. Since the states plainly retain the ability to choose not to comply with the statutory condition here, and the only consequence of such a decision is a small reduction in federal highway aid, Section 158 is plainly not coercive.¹¹

Petitioner relies at several points in its brief (Br. 34, 39, 64) on the dissenting opinions in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), intimating that *National League of Cities v. Usery*, 426 U.S. 833 (1976), the decision that *Garcia* overruled, somehow supports petitioner's position here. But the rule enunciated in *National League of Cities* and its progeny did not affect the Tenth Amendment standard governing Spending Clause enactments.¹² Indeed, the Court's analysis in those decisions actually supports the rule for which we contend here.

The Court concluded in *National League of Cities* that a principal evil of the application of minimum wage requirements to the states was that the federal statute

lative history makes clear, however, that Section 158 was designed to give the states an incentive to adopt a uniform drinking age; Congress was well aware that the states retained the right to make their own choice (see pages 5-6, *supra*).

¹¹ Amici NCSL et al. argue (Br. 28-30) that Congress may not compel the states to enact legislation. But Section 158 does not compel a state to do anything; it simply conditions a portion of a federal grant upon the state's enactment of a minimum drinking age of 21. This Court's decision in *FERC v. Mississippi*, 456 U.S. 742, 766 (1982), as well as its prior decisions upholding similar conditions on federal grants, make clear that such a choice does not violate the Tenth Amendment.

¹² *National League of Cities* itself expressly disclaimed any applicability in the Spending Clause context (426 U.S. at 852 n.17).

"speaking directly to the States *qua* States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress" (426 U.S. at 847-848). "[I]t cannot be gainsaid," the Court observed, "that the federal requirement *directly supplants* the considered policy choices of the States' elected officials and administrators" (*id.* at 848 (emphasis added)).¹³

National League of Cities focused on the direct displacement of state policy choices by the federal government; it was the elimination of the state's discretion that was seen as a violation of the Tenth Amendment. Where a state voluntarily accedes to a condition on a federal grant, there has been no direct federal intervention and *National League of Cities* would not be implicated. Thus, even prior to *Garcia*, the courts of appeals uniformly concluded that the decision in *National League of Cities* did not alter the Tenth Amendment standard governing conditions on federal grants to the states. See *Crawford v. Pittman*, 708 F.2d 1028, 1036-1037 (5th Cir. 1983); *Oklahoma v. Schweiker*, 655 F.2d at 411-414; *New Hampshire Dep't of Employment Security v. Marshall*, 616 F.2d 240, 247 (1st Cir.), appeal dismissed, 449 U.S. 806 (1980); *Walker Field Public Airport Authority v. Adams*, 606 F.2d 290, 297

¹³ The Court subsequently elaborated upon the rule adopted in *National League of Cities*, holding that

in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-288 (1981) (emphasis in original; citations omitted).

(10th Cir. 1979); *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532, 536 & n.10 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978); cf. *FERC v. Mississippi*, 456 U.S. 742, 766 (1982).¹⁴

C. Section 158 Is Not Invalid Under The Twenty-first Amendment

Petitioner contends that under Section 2 of the Twenty-first Amendment the states have plenary authority to regulate the sale and consumption of alcoholic beverages within their borders and that Section 158 violates the Amendment because it seeks to influence the states' exercise of that authority. That contention is wrong for three reasons. First, neither the text of Section 2 nor any decision of this Court suggests that Section 2 confers on the states plenary authority to *permit* their nineteen- and twenty-year olds, and those of neighboring states, to drink alcoholic beverages; to the contrary, an otherwise valid federal restriction on teenage drinking would not contravene the language of Section 2 at all. Second, Section 158 does not reduce the states' authority to regulate drinking; Section 158 instead proceeds from the assumption

¹⁴ Amici National Beer Wholesalers' Association et al. argue (Br. 22-25) that the coercion standard is unrealistic because states cannot as a practical matter decline to accept federal funds. They appear to contend that Congress may impose only such conditions as are supportable under the other enumerated powers. We do not believe that the Court should reconsider the longstanding rule that Spending Power conditions do not require such an independent constitutional justification. And whatever merit there may be in theoretical criticisms of the coercion standard, the sanction here plainly leaves the state the simple expedient of declining, bringing this case well within the holdings of prior cases. We note in addition that the Tenth Amendment is not necessarily the sole source of protection for the states. The Court has recognized that "the federal political process [provides an additional check] in preserving the States' interests" (*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985)).

that the states alone will continue to exercise that authority and, because of the deadly interstate consequences of nonuniformity in one feature of state regulation, it seeks to encourage the states to adopt a uniform rule; states that disagree have the "simple expedient" of not accepting a modest amount of federal funds. Third, if it were necessary to resort to a balancing test of the sort the Court has employed to reconcile conflicts between the Commerce Clause and the Twenty-first Amendment, the national interest in uniformity in this one respect plainly outweighs any competing state interest.

1. *The Twenty-first Amendment is not Implicated Where, as Here, Congress Seeks to Encourage a State to Impose more Stringent Restrictions Upon the Availability of Alcoholic Beverages*

By its terms—whether they are read narrowly or expansively—Section 2 of the Twenty-first Amendment does not reach this case at all. Section 2 says, "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Section 158 does *not* require, or seek to induce, any transportation, importation, delivery, or use of intoxicating liquors in violation of South Dakota law, nor does it seek to induce South Dakota to change its laws to allow any such activity that would have violated its laws as they stood when Section 158 was enacted. The federal statute instead encourages South Dakota to adopt a *more restrictive* regulation regarding the sale and use of alcoholic beverages.

Section 2, by its terms, broadly confirms the states' power to prohibit, restrict, license, tax, or otherwise regulate importation, delivery, or use of alcoholic beverages within their boundaries notwithstanding the Commerce Clause and (in some circumstances) other pro-

visions of the Constitution. But the language of Section 2 plainly does *not* confer or confirm any state right to *permit* particular sales of alcoholic beverages. No decision of this Court has held that an otherwise valid federal law that prohibits specified transactions in alcoholic beverages somehow violates a Section 2 right of a state to *allow* such transactions to occur, and any such ruling would wholly disregard the text of Section 2.¹⁵

Whenever this Court has read Section 2 broadly, it has done so precisely because it was following the words of the Amendment, which broadly confer upon the states the power to burden the importation, delivery, and use of liquor. See *State Board of Equalization v. Young's Market*, 299 U.S. 59, 62-64 (1936) (state license fee for privilege of importing beer permissible because "[t]he words used [in Section 2] are apt to confer upon the State the power to forbid all importations which do not comply with the provisions which it prescribes"; because "the language of the Amendment is clear, we do not discuss" its history); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) (restriction on sales of imported beer permissible); *Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939) (same, because proposed narrowing of states' right to limit importation of alcoholic beverages "would involve not a construction of the

¹⁵ This Court has considered challenges to federal statutes on the ground that federal law could not constitutionally displace a more restrictive state regulatory scheme, rejecting the constitutional challenge in each case. See *324 Liquor Corp. v. Duffy*, No. 84-2022 (Jan. 13, 1987); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); cf. *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939). The Court has not to our knowledge considered a Twenty-First Amendment challenge to a federal statute that had the effect of prohibiting transactions in alcoholic beverages that were permissible under state law.

Amendment but a rewriting of it"). But the words of Section 2 are not "apt" here: they simply cannot be read to protect, against federal cajoling, South Dakota's right to make beer available to its own nineteen year olds and those of neighboring states. Any such construction of Section 2 would require precisely the sort of rewriting of the Amendment that the Court in these early cases rejected.

The history of the Twenty-first Amendment is consistent with its language and confirms that its purpose was to protect the states' right to prohibit or regulate delivery or use of alcoholic beverages, not to insulate from federal authority a state's decision to permit the use of alcoholic beverages in ways its neighbors might find harmful to their citizens. The states have inherent police power to regulate the distribution and consumption of alcoholic beverages. But pre-prohibition decisions of this Court had determined that, having yielded power over interstate commerce to the federal government, the states were not free to burden the movement of liquor in interstate commerce. *E.g.*, *Leisy v. Hardin*, 135 U.S. 100 (1890); *See Craig v. Boren*, 429 U.S. 190, 205 (1976).

In response to these decisions, Congress enacted two statutes that sought to return power to the states to regulate commerce in liquor. The first of these statutes, the Wilson Act, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. 121), was narrowly construed by this Court in *Rhodes v. Iowa*, 170 U.S. 412 (1898). The second statute was the Webb-Kenyon Act, ch. 90, 37 Stat. 699-700 (codified at 27 U.S.C. 122), whose purpose was "to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a state" and "permit the state officers * * * to seize such liquors-[if] intended to be used in violation of the laws of the state." H.R. Rep. 1461, 62d Cong., 3d Sess. 1 (1913). This law was passed over vigorous constitutional objection and President

Taft's veto on constitutional grounds (see 49 Cong. Rec. 4291-4292, 4299, 4447 (1913)).

Several years after the passage of the Webb-Kenyon Act, the Eighteenth Amendment was adopted. The Amendment removed any question regarding the states' authority to regulate commerce in alcoholic beverages because, in Section 2, it expressly relieved the states of the Commerce Clause restriction on their police power to regulate liquor. See *United States v. Lanza*, 260 U.S. 377, 381 (1922).

The Twenty-first Amendment effected the repeal of the Eighteenth Amendment and thereby ended national prohibition (Amend. XXI, § 1). Congress wrote the substance of the Webb-Kenyon Act into Section 2 of the Twenty-first Amendment, primarily for the purpose of insulating state police power to regulate liquor from the implied restrictions of the Commerce Clause and, to some extent, from statutes enacted by Congress pursuant to its authority under the Commerce Clause. See *Craig v. Boren*, 429 U.S. at 206 (Section 2 constitutionalized the arrangement created by the Webb-Kenyon Act, creating an exception to the normal operation of the Commerce Clause); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984).

Senator Blaine, the floor manager of the Amendment, noted the division of opinion concerning the constitutionality of the pre-prohibition statutes designed to enhance state authority to regulate commerce in liquor and stated that "to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line" (76 Cong. Rec. 4141 (1933)). While the assurance to states that they will not have to accept liquor "in violation of" their laws is quite broad, there is no evidence of any intention to prohibit Congress from exercising its Commerce, or Taxing, or Spending Power

to additionally restrict the availability of alcoholic beverages in ways that do not involve transportation, importation, delivery or use of intoxicating liquors in violation of state law.

The history of the proposed but unadopted Section 3 of the Twenty-first Amendment is not to the contrary. That provision would have given Congress the power (which it was presumed to lack after repeal of the Eighteenth Amendment) to "regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold" (76 Cong. Rec. 4138 (1933)). The deletion of Section 3 reflected the belief that the Eighteenth Amendment's grant of additional powers to Congress to regulate local use of liquor had been a mistake: the deletion confirmed the " 'withdraw[al of] the Federal Government from the field of local police regulation into which it has trespassed.' " *324 Liquor Corp. v. Duffy*, No. 84-2022 (Jan. 13, 1987), slip op. 3-4 (O'Connor, J., dissenting), quoting 76 Cong. Rec. 4144 (1933) (remarks of Sen. Wagner). But the deletion of Section 3 did not itself affect Congress's pre-Eighteenth Amendment powers, under the Commerce Clause and the Spending Clause, to legislate in the national interest in ways *not* prohibited by Section 2. It simply reflects a decision not to supply Congress with any additional authority—above and beyond that available under the other provisions of the Constitution—to regulate the use of alcoholic beverages.¹⁶

¹⁶ Senator Wagner, one of the principal opponents of Section 3, objected that it would prevent the attainment of the "equilibrium . . . prior to the Eighteenth Amendment [that] was one of the functional marvels of our system of government" (76 Cong. Rec. 4144 (1933)). He did not appear to view the deletion of Section 3 as effecting any reduction in Congress's pre-Eighteenth Amendment authority. Indeed, shortly after the Twenty-first Amendment was adopted, Congress exercised its residual authority over interstate commerce in

In sum, the deletion of Section 3 has no affirmative effect, and Section 2 limits federal actions with respect to alcoholic beverages only where that action relates to transportation, importation, delivery or use of intoxicating liquor in violation of state law.¹⁷ Because Section 158 neither requires nor encourages either that conduct or any change of state law to permit any activity that would formerly have been a violation, Section 158 cannot violate the Twenty-first Amendment.

alcoholic beverages by enacting the Federal Alcohol Administration Act of 1935, ch. 814, 49 Stat. 977 *et seq.*

Petitioner stresses (Br. 27) that Senator Wagner, in urging the deletion of Section 3, expressed the fear that Congress might utilize the authority conferred by Section 3 to regulate "the sex and age of the purchasers" of alcoholic beverages (see 76 Cong. Rec. 4147 (1933)). But Senator Wagner's point was that the Amendment should not confer on Congress the right to regulate what he correctly viewed, under the circumstances of the time, as a matter of purely local concern. His view prevailed, Congress was not given any such new power, and Congress has not sought to regulate activities of only local import. What Senator Wagner could not have foreseen was that the national highway system, funded by Congress, would help *make* nonuniformity of minimum drinking age an interstate problem by making it easier for teenagers to cross state borders by automobile in search of alcohol. There is no reason to believe that Senator Wagner would have wanted to deny Congress the ability to utilize its preexisting power, under the Spending Clause, to combat a tragic situation related to the highway grant program. Incidentally, Senator Wagner also expressed concern that Section 3 would enable Congress to dictate "the price at which beverages are to be sold" (*ibid.*), but this Court has nevertheless repeatedly ruled that state price regulations may be overridden by federal law. See *324 Liquor Corp. v. Duffy*, *supra*; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, *supra*.

¹⁷The Court only recently observed that "§ 2 directly qualifies the federal commerce power" (*324 Liquor Corp. v. Duffy*, slip op. 10 (emphasis added)).

2. *Section 158 Does not Violate the Twenty-first Amendment Because it Does not Alter the Authority of States to Regulate the Sale and Consumption of Alcoholic Beverages*

Section 158 does not attempt to reduce or otherwise preempt the authority of the states to regulate the sale and consumption of alcoholic beverages within their borders. To the contrary, it proceeds from the premise that states alone will continue to exercise that authority. Noting, however, that nonuniformity in one respect—minimum drinking ages—has lethal consequences, Congress and the President chose a reasonable means of encouraging, but not compelling, the states to act uniformly in this respect. While the question what limitations the Twenty-first Amendment (assuming it is applicable at all) might impose on an exercise of the Spending Power is one of first impression, we suggest that the answer need not be difficult: an exercise of the Spending Power may constitutionally influence the exercise of the state prerogative to regulate drinking, as it may influence the exercise of the prerogatives reserved to the states by the Tenth Amendment, if it passes three tests: the condition must serve a proper national purpose; the condition must bear an appropriate relationship to the spending program; and the grant must be noncoercive.¹⁸

All of this Court's prior decisions interpreting the Twenty-first Amendment address the permissibility of

¹⁸ Petitioner contends (Br. 55-58) that Section 158 is invalid under the doctrine of unconstitutional conditions because it burdens a state's decision to exercise its Twenty-first Amendment "right" to regulate commerce in alcoholic beverages. But that is simply another way of saying that the Twenty-first Amendment limits Congress's power to encourage the states to exercise their regulatory authority in a particular manner. As we discuss in the text, the Twenty-first Amendment, like the Tenth Amendment, permits such congressional action as long as it serves a proper national purpose, is reasonable, and is noncoercive.

coercive limitations upon state authority flowing from other provisions of the Constitution or from preemptive federal regulations.¹⁹ There is no indication in the

¹⁹ Even in that context, the Court has observed that "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Craig v. Boren*, 429 U.S. at 206; see also *324 Liquor Corp. v. Duffy*, slip op. 10 ("[t]he States' Twenty-first Amendment powers, though broad, are circumscribed by other provisions of the Constitution"). The Court has rejected a variety of claims that the Twenty-first Amendment overrides other constitutional limitations upon state authority. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (Establishment Clause); *Craig v. Boren*, 429 U.S. at 204-209 (Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (procedural due process); *Department of Revenue v. James Beam Co.*, 377 U.S. 341, 345-346 (1964) (Export-Import Clause).

The Court has found that the Twenty-first Amendment does not limit some of the powers of the federal government. Thus, the Amendment does not vitiate the federal government's constitutionally-based immunity from state taxation (see *United States v. Tax Comm'n*, 421 U.S. 599, 613-614 (1975)). Neither does the Amendment modify Congress's constitutional authority (see Art. I, § 8, Cl. 17) to legislate with respect to areas under exclusive federal jurisdiction. See *United States v. State Tax Comm'n*, 412 U.S. 363, 373-378 (1973); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938).

The Court has relied upon the Twenty-first Amendment to uphold state statutes against challenges under the Equal Protection Clause, the Due Process Clause, and the First Amendment. See, e.g., *City of Newport v. Jacobucci*, No. 86-139 (Nov. 17, 1986) (per curiam); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam); *California v. LaRue*, 409 U.S. 109 (1972); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. at 394. These decisions are a byproduct of the reallocation to the states of the authority to regulate commerce in liquor. They may be read as indicating that under a balancing test such as the test that applies to government regulations implicating the First Amendment, the weight of the state interest in the challenged regulation is enhanced because of the policy embodied in the Twenty-first Amendment. See *City of Newport v. Jacobucci*, slip op. 3-4; *Larkin v. Grendel's Den, Inc.*, 459 U.S. at 121-122 ("[g]iven the broad powers of states under the Twenty-first

language or history of the Amendment that it was intended to prevent the federal government from encouraging the states, in a manner that passes muster under the Spending Clause and the Tenth Amendment, to exercise their acknowledged authority over alcohol in a particular way. See *324 Liquor Corp. v. Duffy*, slip op. 9-10 (Section 2 of the Twenty-First Amendment reserves the states' "power to regulate"); slip op. 5 (O'Connor, J., dissenting) (Section 2's legislative history reveals that "the Federal Government could not use its *Commerce Clause* powers to interfere in any manner with the States' exercise of the power conferred by the Amendment" (emphasis added)).

For the reasons explained above, Section 158 plainly passes the three tests. First, there is obviously a proper national interest — within the "general welfare" — in achieving uniformity in this one aspect of state regulation of the sale and consumption of liquor. An individual state cannot prevent its neighbors from making liquor available to the first state's teenagers, creating a "blood border" that takes lives and damages property in the first state. The President and Congress both felt strongly that this is a problem of interstate scope, requiring action at the federal level.

Second, the condition imposed by Section 158 passes any test of the appropriate relationship to the purposes of the spending measure to which it is attached. Federal highway funding helps to create the highways that enable persons under 21 to cross state borders in automobiles in search of alcohol. Section 158 seeks among other things to reduce the use of these federally funded highways in a lethal manner.

Amendment, judicial deference to the legislative exercise of zoning powers . . . is especially appropriate in the area of liquor regulation"). Alternatively, the Amendment can be viewed as reducing the restrictions upon state police power imposed by these provisions of the Constitution in the same way that it affects the limits on state authority imposed by the Commerce Clause.

Third, Section 158 falls well within the area in which grant conditions have been found to be noncoercive and therefore to leave the ultimate decision to the states. Section 158 imposes a condition on a small fraction of the federal grant. It seeks, quite properly, to provide significant encouragement toward uniformity of state liquor laws in one respect. But it does not require uniformity: a state that disagrees has the "simple expedient" of declining this portion of the grant, as several states other than South Dakota have chosen to do.²⁰

3. *If a Constitutional Balancing Test is Required, Section 158 Easily Satisfies the Relevant Standard*

In assessing the validity of federal *regulatory* measures, enacted pursuant to the Commerce Clause, that affect the states' prerogative to regulate traffic in liquor, the Court has "engaged in a 'pragmatic effort to harmonize state and federal powers.' " 324 *Liquor Corp. v. Duffy*, slip op. 10-11 (citations omitted); see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 712-714; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. at 110; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964).

Because Section 158 is not a regulation binding on the states but a grant condition that they have the "simple expedient" of refusing, we believe that no such balancing test is appropriate here and that Section 158 should be sustained pursuant to traditional Spending Clause jurispru-

²⁰ The Department of Transportation informs us that, other than petitioner, six states and the Commonwealth of Puerto Rico have laws that do not meet the condition set forth in Section 158.

dence. If the Court does seek to develop a balancing test for application to Spending Clause cases, however, it seems inconceivable that Section 158 would not be upheld. The national interest in uniformity of minimum drinking ages is strong, and South Dakota's contrary interest is not.

The states do, of course, have an important interest in regulating the sale and consumption of alcoholic beverages within their borders. But the weight of South Dakota's interest is in this instance sharply reduced by two facts. First, South Dakota is not denied the right to set a drinking age below 21 but only the right to do so *and* receive the last five percent or ten percent of the federal highway funds to which it would otherwise be entitled; the fact that the federal action here is not a regulation but a spending condition obviously reduces the weight of the state's interest even if it is not (as we argue at pages 31-34, *supra*) entirely dispositive of the case. Second, South Dakota's right to restrict, condition, or tax the sale and consumption of alcoholic beverages is not affected in any way. If South Dakota's interest in *permitting* nineteen- and twenty-year olds to drink beer is protected at all by the Twenty-first Amendment (a point we dispute at pages 25-30, *supra*), it is plainly not an interest that carries anywhere near as much weight as the states' interest in restricting the availability of alcohol.

The Court has indicated that the more "closely [the state interest is] related to the powers reserved by the Twenty-first Amendment," the greater the weight that should be accorded to the state interest. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 714; see also 324 *Liquor Corp. v. Duffy*, slip op. 11.²¹ The Court has not precisely identified

²¹ Petitioner contends (Br. 46-49) that balancing of the state and federal interests is not appropriate if the state statute furthers a "core" interest, because state law automatically prevails over a conflicting federal statute in that circumstance. This Court, however, has never held that a core Twenty-first Amendment interest need not be weighed

the "core" interests that are entitled to such extra weight. But, as we have discussed (see pages 25-30), the plain language and history of Section 2 demonstrate that its central purpose was to protect a state's right to prohibit or restrict the sale or consumption of alcoholic beverages. The Court has indicated that greater weight should be accorded to a statute supported by a state's interest in temperance. For example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court indicated that temperance values have a preferred status under the Amendment, declining to accord special weight to the state's interest in protecting local industry because "[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." 468 U.S. at 276; see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 713 (characterizing the Court's decision in *Midcal Aluminum* as resting on the determination that "the important federal objectives of the Sherman Act" outweighed the interest underlying the State's pricing program because "the State's interest in promoting temperance through the [pricing] program was not substantial").²²

against a competing federal interest; instead, the Court has always applied a balancing test.

There is no reason to adopt a rule bypassing the balancing test in the manner suggested by petitioner. To be sure, a state statute that furthers an interest at the core of the Twenty-first Amendment should be accorded heavy weight in the balancing process, but that is no reason to ignore completely the interests that underlie the competing federal rule. If a federal statute supported by weighty concerns, such as the national defense or public safety, impacts in some way on a state liquor regulation, it would be wrong to require a court to overturn the federal rule without any consideration at all for the relevant federal interest. The more logical approach is to permit consideration of the federal interest while giving added weight to state interests that warrant special protection under the Amendment.

²² Although the Court has referred to regulation of "the sale or use of liquor within [the State's] borders" as the "core § 2 power" (*Capital*

Petitioner asserts (Br. 46) that "the state has a temperance interest in its nineteen-year-old drinking age." But the minimum drinking age statute at issue here is an exception to South Dakota's general minimum drinking age of 21 (see S.D. Codified Law Ann. § 35-4-78 (1986)). To paraphrase an observation made by the Court in a related context, "[o]ne would hardly suggest that the [South Dakota] Legislature set out to promote temperance by" enacting a special, lower drinking age (324 *Liquor Corp. v. Duffy*, slip op. 14).

Petitioner contends that a temperance interest is implicated by the statute because "[t]he South Dakota system promotes keeping some teenage drinking under control by legalizing it and allowing those who would be drinking anyway to do so in a more controlled fashion under state regulations" (Br. 49). But, because the nature of the state interest is important in determining the weight to be accorded the statute, the interest must be supported by more than the post hoc rationalizations of petitioner's counsel.

Cities Cable, Inc. v. Crisp, 467 U.S. at 713), it has not indicated that all state statutes falling within this category are entitled to extra protection under the Twenty-first Amendment. Indeed, that description is so broad as to include virtually every state regulation that could possibly implicate the Twenty-first Amendment at all; it cannot be the case that almost every state statute that implicates the Amendment is entitled to extra weight in the balancing test. This Court's decisions invalidating state laws regulating liquor prices indicate that—at least for the purpose of defining the state interests entitled to special weight in the balancing test—this general interest in state regulation must be viewed as one step away from the "core" of the Amendment. See 324 *Liquor Corp. v. Duffy*, *supra*; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, *supra*; see also *Bacchus Imports, Ltd. v. Dias*, *supra* (invalidating exemption from excise tax on sales of certain liquor at wholesale). While the balancing test applies with respect to such regulations, extra weight is reserved for the subgroup of state regulations that rest upon temperance concerns.

The study cited by petitioner to justify its assertion (Br. 48-49 & n.2) was written more than 40 years after South Dakota's initial decision to adopt a lower drinking age for some alcoholic beverages; petitioner has not indicated that the study ever came to the attention of the South Dakota legislature. And, at least in the absence of a contrary finding by the state legislature, there is no reason to question Congress's quite logical determination (see pages 4-6, *supra*) that a higher minimum drinking age reduces consumption of alcoholic beverages by persons under 21. South Dakota's statute therefore cannot be justified as a temperance measure. Cf. *324 Liquor Corp. v. Duffy*, slip op. 15-16.

The federal interest underlying Section 158 includes the substantial interest in promoting safety on the highways funded by the grants to which Section 158 is attached, as well as other highways constructed with federal funds. Congress and the President devoted considerable attention to the drunk driving problem and concluded that a uniform minimum drinking age would substantially reduce the death toll. They found, in addition, that the interstate nature of the problem mandated a national solution. See pages 4-6, *supra*. These important interests weigh heavily in favor of the federal statute.

The balance of the state and federal interests thus favors the constitutionality of the Section 158. The federal interest in saving lives outweighs the state's more generalized interest in liquor regulation, especially where the state regulation is not supported by temperance concerns. In view of the additional fact that the federal statute does not eliminate the state's freedom of choice, but simply provides an incentive to the states to exercise their regulatory authority in a uniform fashion in this one respect, Section 158 plainly does not violate the Twenty-first Amendment. See Pet. App. A36-A37.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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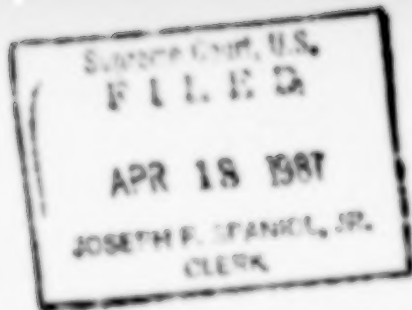
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MARCH 1987

REPLY BRIEF

NO. 86-260



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

THE STATE OF SOUTH DAKOTA,

Petitioner,

v.

THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
IN HER OFFICIAL CAPACITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	-ii-
SUPPLEMENTARY STATEMENT	1
ARGUMENT	6
A. Concessions by the Government	6
B. Reply to Specific Arguments	11
CONCLUSION	25

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>CASES:</u>	
<u>City of Newport v. Iacobucci,</u> 107 S.Ct. 383, 384, 385 (1986)	17
<u>New Orleans v. Dukes,</u> 427 U.S. 297, 303-304 (1976)	22
<u>Railway Express Agency, Inc. v.</u> <u>New York,</u> 336 U.S. 106, 109-110 (1949)	23
<u>Sherbert v. Verner,</u> 374 U.S. 398 (1967)	14, 23
<u>United States v. Caroline Products Co.,</u> 304 U.S. 144, 148-154 (1938)	23
<u>Williamson v. Lee Optical Company,</u> 348 U.S. 483, 487-491 (1955)	22
<u>STATUTES CITED:</u>	
23 CFR, Part 1208	14
Public Law, 100-17, 101 Stat. 132 (April 2, 1987)	5
23 U.S.C. § 158	PASSIM

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(Daily Edition June 26, 1984)
(Remarks of Senator Lautenberg) 3
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Behavior in Florida-1983 Update
(February 1985) 2
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1985, U.S. Department of Transportation
at 26 and 29 6
- U.S. CONST., Amend. 10 PASSIM
- U.S. CONST., Amend. 21 PASSIM

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THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
IN HER OFFICIAL CAPACITY,

Respondent.

SUPPLEMENTARY STATEMENT

The State of South Dakota reasserts the Statement of the Case and of the Facts contained in its main brief.

1. The Solicitor General's statement sets forth at length statistics and argument to the effect that driving while intoxicated is a serious problem. The State of South

Dakota agrees. The State has brought about a thirty-one percent reduction in alcohol related traffic deaths, largely through strict enforcement of drinking driver laws. (Pet.App. A-45). Studies cited in Pet. Br., n.1 at 47, indicate that a drinking age of twenty-one may not produce the results that Congress assumed that it would. Because the State's experience, and the studies cited by the State, indicate that its policy is just as likely to reduce the tragic consequences of drunken driving, it has not chosen a twenty-one drinking age as a possible solution except as a contingency to retain federal funds. See House Bill 1345, App., A-1, et seq. An increase in the drinking age could well be counter productive. Morris, Michael F. Drinking Driving Behavior in Florida-1983 Update (February 1985) (copy previously lodged with the Clerk).

The states have a vital interest in highway safety and in a reduction in drinking while intoxicated. The issue here is not whether statistics support the State or the Government, but rather, who has the constitutional authority to determine the drinking age.

2. It is apparent from the legislative history of 23 U.S.C. § 158 that Congress intended to force all states to adopt a drinking age of twenty-one by its enactment of the statute. 130 Congressional Record, S 8209 (Daily Edition June 26, 1984) (Remarks of Senator Lautenberg). See quotations at n.16, p. 9, Amici Brief of National Conference of State Legislatures, et al. The metaphor employed in these debates is that of the carrot and the stick, with § 158 universally referred to as a "stick," by both its proponents and opponents. The intent was

clearly to displace all contrary policy choices of the states, and substitute the choice of Congress. The Government in effect concedes that § 158 was not enacted to regulate the spending of federal funds, but was rather intended to achieve the "general welfare" purpose of alcohol regulation. (Res. Br. at 17-18). In addition, § 158 has had the effect Congress intended, thereby bolstering the State's characterization of it as regulation. In 1983, only nineteen states had a drinking age of twenty-one. Res. Br. 2. As of this time, forty-three states have adopted a drinking age of twenty-one, several of them protesting coercion by the Federal Government. APP., A-1, et seq., Resolutions at A-5 to A-7, Appendix to Amici Brief of states of Colorado, et al.; Notice Letter from R.A. Barnhart, Federal Highway Administrator, to

State Highway Administrators (April 2, 1987) (copy lodged with the Clerk) (hereinafter "Notice Letter").

3. On April 2, 1987, Congress overrode the President's veto of the Fiscal 1987 Highway Bill. See, Public Law, 100-17, 101 Stat. 132 (April 2, 1987). The funds available to the State of South Dakota under this Bill, which have been sanctioned for noncompliance under 28 U.S.C. § 158, are in the unsanctioned amount at \$68,651,065.00. The sanction thus levied is in the amount of \$3,432,550.00. Assuming the same allocations for fiscal 1988, the sanction would be in the amount of \$6,865,100.00. See, Notice Letter 8, 10. With a population of approximately 708,000, and total highway miles of 78,293, the State of South Dakota has 103.52 miles of highway per person, or the second highest mileage per capita of any

state in the Nation. See, Selected Highway Statistics and Charts-1985, U.S. Department of Transportation at 26 and 29. (Copy lodged with the Clerk.) The sanction of \$3,432,550.00 amounts to almost five dollars per person residing in the State of South Dakota.

ARGUMENT

A. Concessions by the Government.

The Government concedes several key points in its Brief. There is, therefore, some common ground between the parties.

1. Implicit in the Government's brief is the premise that the only real purpose for 23 U.S.C. § 158 is the elimination of border crossing by young drivers to obtain alcohol. The Government asserts no interest in protecting residents of the State from themselves. In this purpose, however, § 158 is both over inclusive and under inclusive.

First, as the Amici National Beer Wholesalers, et al. point out at p. 19 of their Brief, this same problem would exist if a state chose to be "dry," as any state is clearly free to do under the Twenty-first Amendment. Second, a more efficient means of achieving the same result might be to offer the states the option of prohibiting sales to nonresidents under the age of twenty-one unless the state of the young person's residence permitted younger South Dakota residents to drink in that state. As a practical matter, most young adults will be asked to show identification in order to be permitted to drink. This identification, in turn, will probably indicate residence. If the state prohibited drinking by nonresidents under the age of twenty-one unless the state of residence had a reciprocal lower drinking age, the same result would be achieved. The

so-called "blood borders" problem could also be eliminated by the universal enactment of a drinking age of eighteen, nineteen, or twenty.

2. The Government also admits, at n.5, p. 16 of its brief, that that grant conditions may be limited by other provisions of the Constitution. One of those provisions is the Tenth Amendment. Although the Government does not so state, it is equally plain that another of those provisions is the Twenty-first Amendment.

The Government acknowledges (Res. Br. 19) that the Tenth Amendment might bar federal spending conditions that force a state to comply with regulations Congress could not impose directly. The Government states further that a grant condition is permissible so long as the State has a genuine option of avoiding the condition by

rejecting the grant of federal funds. The State would merely add that it is the Government's burden to show that such an option exists. The national government is, after all, a government of limited powers, and may not exercise those powers not specifically granted to it. U.S. Constitution, Tenth Amendment.

3. At footnote 15, page 26, the Government implicitly acknowledges that the Court is facing the Twenty-first Amendment issue raised in this case for the first time. The State would merely add that the Court is therefore free to decide the case unencumbered by direct precedent.

4. The Government admits one of the State's key contentions at pp. 27 and 28, when it states that the purpose of the Twenty-first Amendment was to protect the State's power to prohibit or regulate

delivery of alcoholic beverages, and when it states that the deletion of § 3 of the Twenty-first Amendment confirmed the "withdraw[al of] the federal government from the field of local police regulation into which it had trespassed." The State would add that it is plain that § 158 likewise trespasses into the field of local police regulation of alcoholic beverages by mandating a federal drinking age.

The Government's language implicitly recognizes this. The Government also acknowledges, (Br. 35), that the states have very important interests in regulating the sale and consumption of alcoholic beverages within their borders. It is the State's contention, of course, that these core interests are important enough that they may not be displaced by contrary federal policy.

B. Reply to Specific Arguments.

1. Initially, the State is mystified by the Solicitor General's approach to the Spending Clause question briefed extensively by Amici National Conference of State Legislatures, et al. The Government itself acknowledges (Br. 14), that the State presented the Tenth Amendment question in the Petition for Certiorari. It is fundamental that the Tenth Amendment question merely asks the Spending Clause question in a different fashion. The Tenth Amendment provides that the powers not delegated to the United States by the Constitution are reserved to the states. The question of what powers are "reserved to the states" can be resolved only by determining what powers have been delegated to the United States. Because the national government possesses only such powers as have been delegated to it, it must

affirmatively establish the authority that it claims. If it fails to do so, the Tenth Amendment reserves the power to the states. The State argues, in agreement with Amici National Conference of State Legislatures, et al., that enacting a minimum drinking age, or forcing states to do so, is outside congressional power under the Spending Clause. Section 158 therefore violates the Tenth Amendment, since the power has not been delegated to the United States and is reserved to the states. In fact, the power in question has been delegated to the states. U.S. Const., Amend. 21, § 2. The State submits that it is symptomatic of the Government's blindness to the powers of the states that it fails to identify the Spending Clause and the Tenth Amendment arguments as the same. Far from seeking review of a question not presented by the petition, as

the Solicitor General contends (Br. 10-11, 14) the Amici's arguments go to the crux of the case as litigated and presented by the State.

Second, the Solicitor General's entire argument is premised on a lack of coercion. The State concurs in the arguments made by Amici National Conference of State Legislatures, et al., regarding Congress' power to impose spending conditions unrelated to the purpose of the grant. We also address, in our main brief, and later in this brief, the supposed freedom from coercion. Whether or not coercion is critical, the question centers on the power of Congress to impose the condition in the first instance. The State's ability to refuse the grant is not an independent source of national power under a constitution of limited, delegated powers. The central issue is whether the

State or the national government has the power to make the policy choice at issue, and whether the national government may force the state to trade its constitutional, sovereign prerogatives under the Twenty-first Amendment for money. See Sherbert v. Verner, 374 U.S. 398 (1967).

The Solicitor General relies extensively on policy arguments in favor of adoption of a drinking age of twenty-one. See Br. 1-5, 6, 13, 17, 24-25, 33, and 38. This reliance on policy arguments is the hallmark of a regulatory scheme. Congress was not merely attaching conditions to granted highway funds. The regulatory nature of § 158 is further clear by its sheer length and detail. (See, Petition at 2-7). The Defendant Secretary has also adopted extensive regulations under § 158, 23 CFR Part 1208, which further show the effect and intent to

regulate private conduct. See Argument at 18-21, Amici Brief of National Conference of State Legislatures, et al. The question is whether Congress has the power, under the Spending Clause or any other delegated powers, to adopt a national minimum drinking age, or to force the states to do so.

2. The Solicitor General fundamentally misconceives the nature of the State's power under the Twenty-first Amendment, while, however, recognizing that it is extensive (Br. 35). The State is all the more surprised at the Government's apparent misunderstanding, since the Solicitor General recognizes (Br. 29) that the deletion of § 3 of the Twenty-first Amendment confirmed the "withdraw[al of] the federal government from the field of local police regulation into which it had trespassed." As the immediately preceding discussion in this brief shows,

§ 158 cannot be characterized as anything other than local policy regulation on the national level. If the State does not retain the power, under § 2 of the Twenty-first Amendment, to set its own drinking age, then there remains no area which is free from federal interference. The Solicitor General apparently would limit such federal withdrawal to areas involving "temperance" or those regulations that the Government sees as "restrictions" rather than areas of "permissiveness." This argument fundamentally misconceives the nature of the states' powers under the Twenty-first Amendment. The legislative history of the Amendment, including that cited by the Solicitor General at pp. 28-30 of his brief, makes it plain that Congress intended, in adopting the Twenty-first Amendment, to allow for diversity of regulation, according to the

needs, wants, and desires of the people in the individual states. This Court has also recognized the broad powers of the states to regulate the sale of liquor. City of Newport v. Iacobucci, 107 S.Ct. 383, 384, 385 (1986). The decisions and the legislative history do not support the proposition that this diversity was to be permitted only if the states chose to be more restrictive than Congress. Rather, as the Solicitor General acknowledges at Br. 29, the federal government withdrew from the field of local police regulation. It now seeks, without a change in the constitutional provision prohibiting this "trespass," to trespass yet again. Section 158 is plainly a local police regulation, and it must be stricken as unconstitutional if anything is to remain of the states' extensive powers under the Twenty-first Amendment.

3. The Solicitor General makes no attempt to counter or rebut the arguments at Pet. Br., pp. 33-40, relating to the benefits to be derived from diversity within our federal system. Although such benefits are derived from diversity in any area of regulation, these arguments have particular force where the state regulates alcoholic beverages. The Twenty-first Amendment specifically recognizes the primacy of the states within this area of regulation. As we have noted herein, and as argued by Amici National Beer Wholesalers' Association, et al., at 16-18, the purpose of the Twenty-first Amendment was to allow diversity, not merely to promote temperance. The Amendment itself permitted drinking where it was previously prohibited by the Eighteenth Amendment. It is immaterial that the problem of drinking and driving might be

characterized as being "interstate." See, Res. Br., n.16 at 29-30. Diversity in such matters is guaranteed by the Constitution. Congress cannot avoid its clear constitutional obligations merely because it believes that constitutional limits on its power are no longer appropriate.

4. The Solicitor General also mischaracterizes § 158 as a provision that is "quite limited" and amounts to only "a minor reduction in federal aid" (Br. 21). It may be that the federal government, with its massive resources, considers a withholding of three and one half million dollars to be "a modest amount of federal funds." (Br. 25). This characterization is, however, belied by the reality of the situation for a state the size of South Dakota. As indicated above, the amount withheld amounts to four to five dollars for every man, woman, and child

within the state. It is further apparent from the characterizations of the withholding as a "stick" by both supporters and opponents of § 158 (see fn.16 at Brief of Amici National Conference of State Legislators, et al.), Congress intended to force the adoption of a twenty-one drinking age. It thus adopted a regulation, knowing full well what the effect of the withholding would be. The use of the "stick" obviously worked. As of this time, twenty-four states have changed their laws to comply with § 158. Notice Letter 8, 10; Res. Br. 2. A number of them have, in doing so, protested the congressional use of the "stick." It defies reality for the Solicitor General to argue that the States have any effective choice in the matter of drinking ages. As a matter of reality, the citizens of the states are taxed to support federal road building programs.

It is generally impossible for state legislatures to forego large amounts of federal money, given their own fiscal needs. Congress realized this when it adopted the "stick" of withholding federal funds. The Government cannot escape these facts by characterizing the amount of fund withholding as "modest."

5. From what has gone before, it should be plain that the State does not agree with the Solicitor General's characterization of the State's interests under the Twenty-first Amendment. See Res. Br. 36-38, n. 22. The legislative history clearly indicates that the Twenty-first Amendment sought to withdraw the federal government from the field of local police regulation. It should be plain that the power to regulate at the local level includes the power to decide how stringent that regulation should

be. Even if, however, the states' interest is limited to "temperance," as argued by the Solicitor General, the State does assert a temperance interest. In arguing, at 36-38, that we assert no temperance interest, the Government cites no authority for the proposition that the states' regulation is unsupported by temperance interests. It further cites no authority for the proposition that "the interest must be supported by more than the post hoc rationalizations of petitioner's counsel." Res. Br. 37. To the contrary, this Court must assume the reasonableness of state legislative action, and will not only accept those reasons given for the action, but will hypothesize reasons where none are specifically stated. See, New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976); Williamson v. Lee Optical Company, 348 U.S.

483, 487-491 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109-110 (1949); United States v. Caroline Products Co., 304 U.S. 144, 148-154 (1938). The Government would apparently require the state legislature to state its reason for adopting a particular regulation, and would not credit any supporting data unless it was specifically referred to by the legislature at the time that it enacted the statute in question (Br. 38). The Government cites no authority for this novel restriction of the doctrines of the cited cases. Rather, it would apparently presume that the State's choices are unreasonable, unless the State is able to prove otherwise.

6. The State has argued throughout this litigation that it cannot be forced to trade its constitutionally based sovereignty for money, see Sherbert v. Verner, 374 U.S.

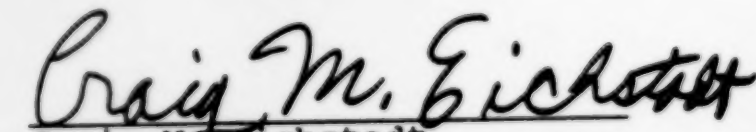
398 (1967); Pet. Br. at 55-58. The Congress and the Secretary have adopted detailed regulation of drinking ages at the national level. The reality of the situation is that this federal regulation has eliminated diversity and experimentation. Such a result is both contrary to the Twenty-first Amendment and to the interests of all governments in developing solutions to the tragic problem of drunk driving. As a matter of constitutional law, the states are given the right to determine the drinking age. As a matter of sound policy, the states serve as experimental laboratories for developing solutions. Section 158 violates this constitutional principle and makes it impossible for the states to fulfill their traditional role as experimental laboratories.

CONCLUSION

28 U.S.C. § 158 violates the principles of the Tenth and Twenty-first Amendments and impedes the development of solutions for the problem of drinking and driving. The State of South Dakota therefore requests that this Court declare § 158 unconstitutional and order appropriate relief in favor of the State.

Respectfully submitted,


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April, 1987

APPENDIX

HOUSE BILL 1345
SOUTH DAKOTA LEGISLATURE
SIXTY-SECOND SESSION
LEGISLATIVE ASSEMBLY, 1987

AN ACT

ENTITLED, An Act to revise certain statutes
relating to the sale and consumption of
alcoholic beverages.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE
OF SOUTH DAKOTA:

The South Dakota Legislature enacts this
legislation to raise the state's minimum
drinking age to twenty-one years of age
solely under the duress of a funding sanction
imposed by the United States department of
transportation under 23 USC 158. The
Legislature strongly objects to being forced
to choose between loss of highway
construction funds, which are badly needed to
construct priority road projects to promote
the public health and safety of the state's
inhabitants and visitors, and loss of its

right to set its own drinking age. The action taken by this Legislature shall not be construed as a concession or waiver of its constitutional right to establish at what age an individual may lawfully purchase, possess and consume alcoholic beverages. Rather, it is taken to ensure that South Dakota is not penalized while it challenges in the United States Supreme Court the federal government's attempt to usurp the state's right to regulate the drinking age of its citizens. This legislation is enacted with the expressed intent of providing the South Dakota attorney general the maximum flexibility to pursue South Dakota's challenge to the federal government's intrusion into a right reserved to the state while ensuring the full availability of federal highway funds for the 1988 construction season. It is the intent of this Legislature that if any time before or

after the effective date of this legislation the provisions of 23 USC 158 are repealed, expired or declared invalid by the United States Supreme Court, the provisions of this legislation shall become null and void and any provision repealed by the Act shall be revived pursuant to § 2-14-19.

Section 1. That subdivision (8) of § 35-1-1 be repealed.

Section 2. That subdivision (23) of § 35-1-1 be amended to read as follows:

(23) "Transportation company," or "Transporter," any common carrier or operator of a private vehicle transporting or accepting for transportation any alcoholic beverages, but not including transportation by carriers in interstate commerce where the shipment originates outside of the state and is destined to a point outside of the state;

. . .

Section 10. That §§ 35-6-1 to 35-6-34, inclusive, be repealed.

Section 11. That § 35-9-1 be amended to read as follows:

35-9-1. It is a Class 2 misdemeanor to sell or give for use as a beverage any alcoholic beverage to any person under the age of twenty-one years unless it is done in the immediate presence of a parent or guardian or spouse over twenty-one years of age or by prescription or direction of a duly licensed practitioner or nurse of the healing art for medicinal purposes.

Section 12. That § 35-9-2 be amended to read as follows:

35-9-2. It is a Class 2 misdemeanor for any person under the age of twenty-one years to purchase, attempt to purchase or possess or consume alcoholic beverages except when consumed in a religious ceremony and given to said person by an authorized person, or to

misrepresent his age with the use of any document for the purpose of purchasing or attempting to purchase alcoholic beverages from any licensee licensed under this title.

Section 13. That § 35-9-4 be repealed.

Section 14. That § 35-9-5 be repealed.

Section 15. That § 35-4-1 be amended to read as follows:

35-4-1. The provisions of this chapter, unless the context otherwise clearly requires, shall be construed to relate to all alcoholic beverages.

. . .

Section 57. The effective date of this Act is April 1, 1988; however, if at any time before or after the effective date of this Act, the provisions of 23 USC 158 which authorize or require the United States secretary of transportation to withhold certain money from the State of South Dakota are repealed, expire or are declared invalid

by the United States Supreme Court, then the provisions of this Act shall become null and void and any provision repealed by this Act shall be revived pursuant to § 2-14-19.

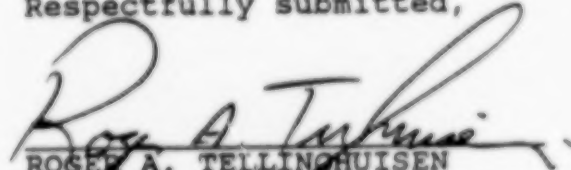
Approved by the Governor: March 18, 1987.

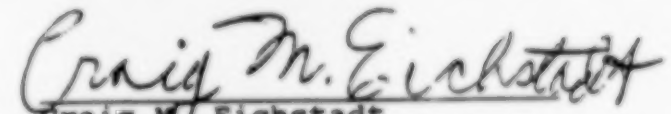
Filed with the Secretary of State: March 19, 1987.

CONCLUSION

28 U.S.C. § 158 violates the principles of the Tenth and Twenty-first Amendments and impedes the development of solutions for the problem of drinking and driving. The State of South Dakota therefore requests that this Court declare § 158 unconstitutional and order appropriate relief in favor of the State.

Respectfully submitted,


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April, 1987

AMICUS CURIAE

BRIEF

⑤
No. 86-260

Supreme Court, U.S.
FILED

OCT 31 1986

JOSEPH F. SPANIOLO, JR.
CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1986

STATE OF SOUTH DAKOTA,
Petitioner

v.

THE HONORABLE ELIZABETH H. DOLE,
SECRETARY, UNITED STATES DEPARTMENT
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OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

**BRIEF OF AMICI CURIAE, PHILLIP J. MACDON-
NELL, JOSEPH W. SOUZA, EDWARD A. FARRIS,
MICHAEL W. RUSSELL, JANE SCHROEDER, LARRY
WEWAL, ABE E. RODRIQUEZ, HUGH B. MARIUS,
TERRENCE R. FLYNN, AND JOSEPH VAN COLLOM,
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QUESTIONS PRESENTED**I**

Whether or not there is a conflict between the South Dakota law which has established a minimum drinking age for low point beer (beer of less than 3.2 percent alcohol by weight) of nineteen years of age and 28 U.S.C. § 158, the national minimum drinking age.

II

Whether or not the balance of competing interests weighs in favor of the States due to their exclusive right to determine the lawful age for the consumption of alcoholic beverages, which goes directly to the core of the States' authority under the Twenty-first Amendment to regulate the "delivery and use" thereof.

SUBJECT INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Statement of the Case	2
Interest of Amici Curiae	3
Reasons for Granting the Writ	5
Argument	6
Introduction	6
STAA Does Conflict With State Laws Which Create a Minimum Drinking Age	9
The Balance of Competing Interests Weighs in Favor of the States Due To Their Exclusive Right to Determine the Lawful Age for the Con- sumption of Alcoholic Beverages, Which Goes Directly to the Core of the States' Authority Under the Twenty-First Amendment to Regulate the "Delivery and Use" Thereof	12
Conclusion	17
Appendix	1a

TABLE OF AUTHORITIES

CASES	
	PAGE
<i>Bacchus Imports, Ltd. v. Dias</i> , 104 S. Ct. 3049, 3058 (1984)	9
<i>Brown-Forman Distillers v. New York Liquor Author- ity</i> , U.S. (1986) (Case No. 84-2030)	10, 11, 14
<i>California v. LaRue</i> , 409 U.S. 109, 115 (1972)	6, 8
<i>California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et al.</i> , 445 U.S. 97, 110 (1980)	9, 13, 14
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984) ..	13
<i>Clark Distilling Co. v. Western Maryland Railroad Company</i> , 242 U.S. 311 (1917)	7
<i>Craig v. Boren</i> , 429 U.S. 180, 206 (1976)	6
<i>New York State Liquor Authority v. Ballanca</i> , 452 U.S. 764, 765 (1986)	14
<i>Hostetter v. Idelwild Liquor Corp.</i> , 377 U.S. 324, 332 (1964)	12
<i>Leisy v. Harden</i> , 135 U.S. 100 (1890)	6
<i>The License Cases</i> , 46 U.S. 1504 (1847)	6
CONSTITUTION	
U.S. Const. Article I, § 8, Cl. 1	12
U.S. Const. Article VI, Cl. 2	13
U.S. Const. amend. I	13
U.S. Const. amend XVIII	7
U.S. Const. amend XXI	3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19
STATUTES	
26 Stat. 313 (current version at 27 U.S.C. § 121)	6
37 Stat. 699 (current version at 27 U.S.C. § 122)	6, 7
23 U.S.C. § 158	2, 3, 4, 5, 7, 9, 10, 11, 15, 16, 17, 18
28 U.S.C. § 1254(1)	2
OTHER	
76 Cong. Rec. 4138 (1933)	8
76 Cong. Rec. 4147 (1933)	11
76 Cong. Rec. 4177 (1933)	8
76 Cong. Rec. 4178 (1933)	8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-260

STATE OF SOUTH DAKOTA,
Petitioner

v.

THE HONORABLE ELIZABETH H. DOLE,
SECRETARY, UNITED STATES DEPARTMENT
OF TRANSPORTATION, IN HER
OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE, PHILLIP J. MACDON-
NELL, JOSEPH W. SOUZA, EDWARD A. FARRIS,
MICHAEL W. RUSSELL, JANE SCHROEDER, LARRY
WEWAL, ABE E. RODRIQUEZ, HUGH B. MARIUS,
TERRENCE R. FLYNN, AND JOSEPH VAN COLLOM,
JR.

OPINION BELOW

The opinion of the United States Court of Appeals for
the Eighth Circuit in *State of South Dakota v. Dole* is
reported at 791 F. 2d 628 and appears in the Appendix
of Petitioner's brief.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was dated and entered May 21, 1986. The Petition for Writ of Certiorari was timely filed on August 18, 1986. This Court's jurisdiction was invoked by the Petitioner under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

On July 17, 1984, Congress enacted STAA which mandates that each state adopt a minimum drinking age of twenty-one.

STAA will result in a portion of federal highway funds being withheld from any state which fails to enact by October 1, 1986, legislation establishing twenty-one as the minimum drinking age for alcoholic beverages.

The State of South Dakota prohibits the consumption of all alcoholic beverages except "low point beer" by persons under the age of twenty-one.

South Dakota, under the legislation, would have \$4,156,000.00 withheld in 1987 and \$8,312,000.00 in 1988 for its failure to enact a national minimum drinking age of twenty-one years for all alcoholic beverages, including low point beer.

During September of 1984, the Petitioner, State of South Dakota, filed its Complaint for Declaratory Relief wherein it sought in pertinent part a declaration from the District Court that STAA was unconstitutional in that it was a usurpation of the States' authority to regulate the delivery and use of alcoholic beverages.

On May 3, 1985, the District Court entered an Order granting the Respondent's Motion to Dismiss the Complaint with prejudice for failure to state a claim upon which relief can be granted.

Petitioner appealed the dismissal of its Complaint to the United States Court of Appeals for the Eighth Circuit on June 26, 1985. That Court affirmed by opinion and judgment dated and filed May 21, 1986. Petitioner timely filed its Petition for Writ of Certiorari on August 18, 1986.

INTEREST OF AMICI CURIAE

Each of the individual Amicus Curiae is employed in some capacity and/or charged with the duty and responsibilities of regulating the manufacture, importation, transportation, distribution, sale and consumption of intoxicating liquors within their respective jurisdictions. A list of the individual Amicus Curiae and their respective capacities of employment is set forth in the Appendix of this brief.

The interests of the Amici are not limited solely to the issue of the minimum drinking age, but rather to the integral relationship between the Twenty-first Amendment and the power of the Federal Government to erode, if not eliminate, the States' rights thereunder.

The filing of the brief of the Amici Curiae is desired in order to present to this Court the far-reaching effects of the erroneous decision of the lower court which held that South Dakota, or any State, is not denied its power to regulate the use and possession of alcoholic beverages through the implementation of 23 U.S.C. § 158, an amendment to the Surface Transportation Assistance Act of 1982 (STAA). Said amendment mandates that each State adopt a minimum drinking age of twenty-one as a condition to receiving its apportioned federal aid highway funds. The lower court further erred in finding that there is no conflict between state and federal interests and, there-

fore, no need to balance same in determining whether or not the States' sovereignty has been impermissibly threatened.

Rather, the Amici contend, in support of the Petition of the State of South Dakota, that as a result of the implementation of STAA and the decision of the lower court, the States will be denied the core of the authority guaranteed by the Twenty-first Amendment.

The lower court has divested the State of South Dakota and each of the other States of their authority to regulate the manufacture, importation, transportation, distribution, sale and consumption of intoxicating liquors. Said authority is derived from the Twenty-first Amendment. This case is, therefore, important since it conflicts with applicable decisions of this Court and other Circuits and effectively does away with the only grant of authority to the States contained in the United States Constitution to regulate a specific industry. Therefore, the issues raised in the Petition are of paramount importance which must be decided by this Court.

REASONS FOR GRANTING THE WRIT

The decision of the Eighth Circuit raises issues of grave concern to the States in that said decision will have the effect of divesting the States of their exclusive authority as mandated by the Twenty-first Amendment to determine the lawful age for the consumption of alcoholic beverages. This exclusive right goes directly to the core of the States' authority under the Twenty-first Amendment to regulate the "delivery and use" thereof.

The lower court erred in finding that STAA does not conflict with any state interest and, therefore, deciding that there is no need to weigh the state interest against the federal interest. The lower court failed to apply a long standing and fundamental test to the challenged legislation which failure is contrary to decisions of this Court and of other Circuits.

If the lower court's decision is left undisturbed it will seriously erode the significant powers vested in the States by the United States Constitution which grant of said powers followed years of historically significant debates and decisions. Congress will have been permitted to invade rights specifically intended to be delegated to the States under a veil of its spending authority. The States are being held hostage by the challenged legislation which this Court must not permit.

ARGUMENT

Introduction

Congress, tempered by the experience of pre-prohibition, as well as the prohibition era (prior to 1933), uniquely constitutionalized an industry by adoption of the Twenty-first Amendment (December 5, 1933). *Craig v. Boren*, 429 U.S. 190, 206, (1976). Based upon past history, public attitudes and actions, Congress intended to treat liquor separate and apart from other articles of commerce, and delegated jurisdiction over regulatory control of the industry to the states, as opposed to the federal government. *California v. LaRue*, 409 U.S. 109, 115 (1972). Thus, the adoption of the Twenty-first Amendment, reversed the constitutional relations between the state and federal authority as to regulatory control of the alcoholic beverage industry.

This transition to state supremacy is more easily understood by briefly reviewing congressional initiatives and judicial decisions before and after the adoption of the Twenty-first Amendment. Prior to 1890, the states dominated control of liquor. *The License Cases*, 46 U.S. 504 (1847). However, this trend started to change by the late 1800's. *Leisy v. Harden*, 135 U.S. 100 (1890). In 1890, Congress approved the "Wilson Original Packages Act" ("Wilson Act"), 26 Stat. 313 (current version at 27 U.S.C. Section 121) which gave the states authority to regulate liquor, as though produced therein, notwithstanding their introduction in original packages. Passage of the "Wilson Act" was the Congressional beginning of vesting the States with dominant control over regulatory authority of alcoholic liquors. In 1930, Congress expanded upon the theory of state supremacy by enacting the Webb-

Kenyon Act, 37 Stat. 699 (current version at 27 U.S.C., Section 122) which prevented shipment of alcoholic liquors into a state against state law. *Clark Distilling Co. v. Western Maryland Railway Company*, 242 U.S. 311 (1917).

During the early 1900's, the prohibition movement in the United States was attracting a broad base of public support, and culminated with ratification of the Eighteenth Amendment on January 16, 1919. Historically, the Eighteenth Amendment was known as the "noble experiment" and officially failed with ratification of the Twenty-first Amendment on December 5, 1933. Tempered by widespread lawlessness, the rise of organized crime and open contempt of federal law, as evidenced by the Congressional Record upon which the Twenty-first Amendment was adopted, it was clearly the intention of Congress to divest itself of primary regulatory power in favor of state control.

As introduced in the Senate, the Twenty-first Amendment contained three substantive sections:

SECTION 1. The Eighteenth Article of amendment to the Constitution of the United States is hereby repealed. (adopted)

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. (adopted)

SECTION 3. Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold. (Deleted in Senate) 76 Cong.Rec. 4138 (1933).

Section Three was eliminated by Congress in order to dispel any notion relative to the supremacy of federal

regulation of liquor sales. As Senator Wagner pointed out:

"We have expelled the system of national control through the front door . . . and readmitted it forthwith through the back door of Section 3, and that is the ironical result of *an amendment designed to restore to the States control of their liquor problem.*"

"If this amendment should become a part of the constitution containing Section 3, it would take away from the State the right the State now has to regulate or prohibit the sale of liquor. *It would take it away by giving that power to Congress . . .*"

"Instead of being a movement to permit the States to prohibit the sale of liquor in a saloon, this amendment would deprive the States of the right to prohibit the sale of liquor in a saloon. *Both the State and the Federal Government cannot have the power at the same time. The action of one of them will be the supreme law of the land,* and the supreme law of every State is the Constitution of the United States. When the Constitution delegates to Congress the right to determine in what way liquor shall be sold in a State, if it is sold, then a law enacted by Congress will be supreme, and the States of this Union will be helpless, they cannot regulate the sale of liquor within their own boundaries, nor can they prohibit it." 76 Cong.Rec. 4138, 4177, 4178 (1933). (Emphasis added)

Thus, the unique constitutional history surrounding the Twenty-first Amendment memorialized the fact that there is no national concensus when it comes to the sale and consumption of alcoholic beverages. The Twenty-first Amendment is unique in many aspects.

1. It is the only Amendment which repealed a previous Amendment thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product—intoxicating liquors. *California v. LaRue*, 409 U.S. 109, 115 (1972).

2. It was the first, and to date, only Amendment that was ratified by conventions in the states, rather than by state legislatures.

3. It repealed national prohibition, but not prohibition. Under Section 2, states still maintain the power to prohibit the manufacture and sale of alcoholic beverages. It represents the only express grant of power to the states.

Subsequent to the adoption of the Twenty-first Amendment, several of the states throughout the United States approved separate acts and regulations pertaining to control and regulation of the alcoholic beverage industry. The statutes and regulations differ considerably from state to state, as they relate to the same subject matter pertaining to alcoholic beverage control, such as manufacturing, distribution, marketing, licensing, pricing, standards of fill, together with the time, place and age of consumption.

STAA DOES CONFLICT WITH STATE LAWS WHICH CREATE A MINIMUM DRINKING AGE.

The lower court correctly noted that:

" . . . in the area of alcohol regulation, when state and federal law directly conflict, a balancing of the state and federal interests involved may result in state laws prevailing over a conflicting federal enactment. *See Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049, 3058 (1984); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 109. . ." 791 F.2d at 633.

The court, however, avoided the balancing of interests test by reaching the erroneous conclusion that:

" . . . Very simply, in this instance, no conflict exists. Both the federal enactment and South Dakota

state law are fully operative; neither law undermines the legal force and effect of the other. In fact, the federal law necessarily recognizes the state's power to reject Congress's judgment and adopt and legally maintain any drinking age it chooses. South Dakota is entirely free to maintain its law as it now exists and will violate no federal law if it chooses to do so." 791 F.2d at 634

The lower court's conclusion ignores not only reality but also the historical framework cited hereinabove. The choice which the lower court says each State has is no more an actual right to choose than is a hostage crisis. STAA offers each State the option of adopting the minimum drinking age Congress deems appropriate, to wit, twenty-one, or losing the right to millions of dollars in federal highway funds. The States, in other words are being coerced into accepting Congress' judgment and abandoning their own localized notions of what is acceptable for its citizens.

In order for the lower court to reach the conclusion that there is no conflict between state and federal laws it first adopted a premise which flies in the face of the Twenty-first Amendment. At page 633 the court below stated that:

"... At bottom while the twenty-first amendment in no way increased Congress's authority to legislate with regard to liquor, the amendment did not limit or withdraw Congress' ability to exercise authority under its existing delegated powers, including the spending power."

This premise is fundamentally wrong. The Twenty-first Amendment clearly limited Congress' authority over the regulation of liquor as it pertains to matters within the State. *Brown-Forman Distillers v. New York Liquor*

Authority, U.S. (1986) (Case No. 84-2030). The Congressional intent behind the adoption of Sections 1 and 2 of the Twenty-first Amendment and the deletion of Section 3 could hardly be clearer. Congress elected to place in the hands of each State the power to legislate all aspects of the delivery and use of alcoholic beverages, including the determination of a minimum drinking age.

This is best seen by another reference to the 1933 Congressional Record wherein Senator Wagner stated:

"If Congress may regulate the sale of intoxicating liquors, where they are to be drunk on premises, where sold, then we shall probably see Congress attempt to declare what hours such premises may be open, where they shall be located, the sex and age of the purchasers, the price at which the beverages are to be sold." 76 Cong.Rec. 4147 (1933) (Emphasis added)

Senator Wagner's comments are so clear they are not open to interpretation. State and municipal laws and ordinances relative to licensing and zoning obviously address the issues raised by Senator Wagner and all States have adopted a minimum drinking age as well. A federal minimum drinking age is but the first invasion into an area of legislation peculiarly suited to the States.

It can be seen that despite the lower court's decision, STAA clashes with South Dakota's minimum drinking age law and those of all States. If the decision of the lower court is permitted to stand, the conflict can only be resolved if:

1. South Dakota does without millions of dollars in federal highway funds, potentially leading to dangerous conditions for all drivers and passengers notwithstanding the drinking age; or

2. Succumbing to the will of Congress and adopting its judgment of a proper minimum drinking age.

Reality dictates the conclusion that an actual conflict exists between state and federal laws requiring the implementation of the balancing of interests test. The lower court erred in its finding that no such conflict exists.

THE BALANCE OF COMPETING INTERESTS WEIGHS IN FAVOR OF THE STATES DUE TO THEIR EXCLUSIVE RIGHT TO DETERMINE THE LAWFUL AGE FOR THE CONSUMPTION OF ALCOHOLIC BEVERAGES, WHICH GOES DIRECTLY TO THE CORE OF THE STATES' AUTHORITY UNDER THE TWENTY-FIRST AMENDMENT TO REGULATE THE "DELIVERY AND USE" THEREOF.

Although the lower court recognized the existence of a test for weighing conflicting interests between state and federal laws, it failed to apply the test holding that no conflict exists. As has been shown herein, there clearly exists a constitutional conflict between the federal interest as derived under the Spending Clause, Article I, § 8, Cl. 1, and the states' interests under the Twenty-first Amendment. Conflicts of this nature can only be resolved through the identification of the competing federal and state interests, together with the application of the traditional balancing of said interests. It is not enough to identify the various competing interests by general statements or platitudes. Rather, as instructed by this Court, there first must be a factual basis presented in order to identify and properly weigh the federal and state interests. As this Court enunciated in *Hostetter v. Idelwild Liquor Corp.*, 377 U.S. 324, 332 (1964):

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like

other provisions of the Constitution, each must be considered in light of the other and in the context of the issues and interest at stake in any concrete case. . .

"Competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case." See also *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et al.*, 445 U.S. 79, 110 (1980).

The basic premise of balancing federal and state interests is in no way unique as to the Twenty-first Amendment. The same test applies equally to other competing state and federal interests as well.

The case of *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) is a case wherein the balancing test was applied. In *Capital Cities*, the Oklahoma Attorney General rendered an opinion that the State's advertising ban prohibited local cable television operators from retransmitting signals originating from out-of-state which contained commercials advertising alcoholic beverages, particularly wine. The local operators filed suit in Federal District Court seeking declaratory and injunctive relief. The Complaint alleged that Oklahoma's policy violated various provisions of the Federal Constitution, including the Supremacy Clause, Article VI, cl. 2, and the First Amendment. The District Court granted the local operators summary judgment and held that the State's advertising ban was an unconstitutional ban on commercial free speech.

This Court, in upholding the District Court, held that the FCC, over the past 20 years and on an exclusive basis, pre-empted state and local regulation of any type of signal carried by cable television systems and, further, that the

Twenty-first Amendment did not save Oklahoma's advertising ban from pre-emption as a result of the State's very limited interest, since the State's ban was directed only at occasional wine commercials appearing on out-of-state signals carried by cable operators while the State permitted advertisements for all alcoholic beverages carried in newspapers and other publications printed outside Oklahoma but sold in the State.

Justice Brennan, in writing for the majority and in weighing the various competing interests, carefully noted with regard to the State's limited ban on advertising that:

"The State's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated."

States possess almost unlimited authority to regulate the "times, places and circumstances under which liquor may be sold." *New York State Liquor Authority v. Ballanca*, 452 U.S. 764, 765 (1986). They have and continue to exclusively determine the drinking age for alcoholic beverages. Historically, state enactments under the Twenty-first Amendment have overwhelmingly survived legal challenges based upon perceived violations of other federal statutory and constitutional provisions. In each instance, the Court has carefully scrutinized the competing federal and state interests. *California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc., et al.*, 445 U.S. 79, 110 (1980).

So too, in the very recent case of *Brown-Forman Distillers v. New York Liquor Authority*, U.S. (1986) (Case No. 84-2030), this Court emphasized that each State has the right to regulate the sale of liquor within its own territory. In recognizing that each state may

have a different regulatory scheme, the Court stated that:

"That Amendment [Twenty-first], therefore, gives New York only the authority to control sales of liquor in New York and confers no authority to control sales in other states."

The entire thrust of the STAA is Congress's mandating of a minimum drinking age. Once a State adheres to the mandate, the federal government has but one further act to perform, to wit, paying the State apportioned highway funds. At all time thereafter, it is the State which bears the burdens and responsibilities associated not only with liquor consumption, but also highway safety. The State must:

1. enforce the minimum drinking age;
2. enforce laws against drunk driving regardless of age;
3. enforce the manner in which all drivers utilize motor vehicles and highways;
4. enforce laws having anything whatsoever to do with the sale of on-premise and off-premise consumption;
5. enforce laws allowing voters of a political subdivision to decide whether said subdivision should be "wet" or "dry"; and
6. create, monitor and control an entire panoply of other state and/or local regulations which involve the delivery and use of alcoholic beverages.

The above non-exclusive list applies to each of the fifty states. There is no uniform set of laws which control the components of the list. Rather, there are *fifty different comprehensive statutory schemes* which reflect the localized needs and desires of the citizens. The authority for permitting such diverse ways of thinking is the Twenty-first Amendment. In point of fact, it was Congress's will

and desire as seen be the above references to the 1933 Congressional Record that the states legislate the liquor industry, including consumption because state lawmakers are more in tune and in touch with the peculiar needs of the inhabitants of the state. It could hardly be argued that the needs and desires of the citizens of South Dakota are for example exactly the same as those of the citizens of Arizona.

This Court must not permit Congress, under the guise of utilizing its spending powers, to usurp the rights of States to regulate the delivery and use of alcoholic beverages. Such will be the case if the Eighth Circuit's decision stands. In effect, proposed Section 3 to the Twenty-first Amendment which was deleted fifty-three years ago will be reinserted.

It must be remembered that this cause was disposed of at the trial court level on Respondent's Motion to Dismiss. Therefore, absolutely no evidence of any kind was presented to the court demonstrating that the federal government's interest in highway safety is equal to, let alone greater than, that of the state. In point of fact, had an evidentiary hearing been conducted, it is the position of Amici Curiae that the court would have been convinced that the States have an interest in highway safety which exceeds that of the federal government and when coupled with the States' overwhelming interest in regulating intra-state liquor consumption pursuant to the Twenty-first Amendment, would have stricken STAA.

Thus, the federal government has failed to show any interest greater than that of the states in highway safety or the delivery and use of alcoholic beverages. Further,

the lower court has overemphasized the importance of the tenuous relationship between the creation of a national drinking age and highway safety. More importantly, the ability of the States to determine the lawful age of consumption is not incidental, but rather at the core of the States' exclusive right to regulate the "delivery and use" of alcoholic beverages within their borders. The States' central power under the Twenty-first Amendment is directly implicated, and the STAA must fall.

The principles as enunciated by the lower court, if permitted to stand, will jeopardize the regulatory primacy which has been vested in the States as a result of over fifty years of constitutional, legislative and judicial direction. Considering the sensitive and emotional nature of alcoholic beverages in today's society, the public interest appeal of the Amici is no less important, but rather much greater than the federal government's enunciated interest in highway safety.

CONCLUSION

The Amici need not attempt to expand Petitioner's discussion of each of the issues raised by this appeal. Rather, the Amici have confined themselves to what they believe are the dispositive issues and that which is central to their interests. As previously stated, the lower court did not engage in a careful scrutiny of the competing interests, which the Amici contend would have resulted in the striking of a balance in favor of the State of South Dakota and the invalidation of STAA.

Pursuant to STAA, States which fail to take action by October 1, 1986, will fall victim to the federal sanctions and lose five percent of their federal highway funds in fiscal year 1987, and an additional ten percent in 1988. The federal government cannot under the guise of the Spending Clause usurp from the states their authority to regulate the use and consumption of alcoholic beverages within their borders. For the lower court to hold that the STAA merely provides strong incentive for the states to waive their rights under the Twenty-first Amendment, belies the political and practical realities of state government. It is inconceivable that elected state officials could risk the political consequences of losing millions of dollars of sorely needed revenue. Thus, we are not talking about mere coercion, but rather the outright extinguishment of the exclusive rights of the States which have been guaranteed by the Twenty-first Amendment. The age at which alcoholic beverages may be consumed, just as the time, manner and place, are not, as was Oklahoma's partial ban on certain advertising, indirectly related to the regulatory scheme. They are at the core of, and central to the powers expressly and exclusively granted to the states by the Second Section of the Twenty-first Amendment to regulate the "delivery or use thereof."

The decision of the lower court is merely the first attempt at the adoption by indirect means, of the proposed and rejected third section to the Twenty-first Amendment, which would have granted the federal government concurrent power to regulate or prohibit the sale of intoxicating liquors. Therefore, a Writ of Certiorari should be granted to resolve the conflict created by the Eighth Circuit.

Respectfully submitted,

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APPENDIX

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Edward A. Farris, Commissioner of the Department of Alcoholic Beverage Control for the State of Kentucky.

Michael W. Russell, Commissioner and Assistant Secretary of the Louisiana Department of Public Safety of the Office of Alcoholic Beverage Control.

Jane Schroeder, Chairwoman of the Board of Liquor Commissioners for Baltimore, Maryland.

Joseph Van Collom, Jr., Executive Secretary of the Board of Liquor Commissioners for Baltimore, Maryland.

Larry Wewal, Executive Director of the Nebraska Liquor Control Commission.

Abe E. Rodriguez, Director of the Department of Alcoholic Beverage Control of the State of New Mexico.

Hugh B. Marius, former Commissioner of the New York State Liquor Authority.

AMICUS CURIAE

BRIEF

JAN 21 1987

JOSEPH F. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF SOUTH DAKOTA,

Petitioner,
v.

ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICI CURIAE
NATIONAL BEER WHOLESALERS' ASSOCIATION
AND 46 STATE BEER, WINE, AND
DISTILLED SPIRITS ASSOCIATIONS
IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The Twenty-first Amendment Reserves to the States the Authority to Set Minimum Drink- ing Ages	5
II. Congress May Not Avoid the Limitations on Its Power in the Twenty-first Amendment by Proceeding under the Spending Power	20
CONCLUSION	26

TABLE OF AUTHORITIES

Cases	Page
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	7, 15-16, 17
<i>Battipaglia v. New York State Liquor Authority</i> , 745 F.2d 166 (2d Cir. 1984), cert. denied, 470 U.S. 1027 (1985)	10, 16
<i>Brown-Forman Distillers Corp. v. New York State Liquor Authority</i> , 106 S. Ct. 2080 (1986)	15
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	20
<i>California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980)	6, 8, 12, 13, 17
<i>California v. LaRue</i> , 409 U.S. 109 (1972)	5, 6
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984)	7, 13, 15, 17
<i>Castlewood International Corp. v. Simon</i> , 596 F.2d 638 (5th Cir. 1979), vacated and remanded, 446 U.S. 949, opinion reinstated, 626 F.2d 1200 (1980)	7
<i>City of Newport v. Jacobucci</i> , 107 S. Ct. 383 (1986)	5-6
<i>Cleveland Board of Education v. Loudermill</i> , 470 U.S. 532 (1985)	21
<i>Collins v. Yosemite Park & Curry Co.</i> , 304 U.S. 518 (1938)	11
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	8, 12, 16
<i>Department of Revenue v. James B. Beam Distilling Co.</i> , 377 U.S. 341 (1964)	9, 11-12, 16
<i>Frost & Frost Trucking Co. v. Railroad Comm'n</i> , 271 U.S. 583 (1926)	21
<i>Gabree v. King</i> , 614 F.2d 1 (1st Cir. 1980)	14
<i>Garcia v. San Antonio Metropolitan Transportation Authority</i> , 469 U.S. 528 (1985)	22
<i>Hostetter v. Idlewild Bon Voyage Liquor Corp.</i> , 377 U.S. 324 (1964)	8, 9-11, 12, 15
<i>Houser v. State</i> , 85 Wash.2d 803, 540 P.2d 412 (1975)	14
<i>Joseph E. Seagram & Sons v. Hostetter</i> , 384 U.S. 35 (1966)	16
<i>King v. Smith</i> , 392 U.S. 309 (1968)	20

TABLE OF AUTHORITIES—Continued

	Page
<i>Larkin v. Grendel's Den, Inc.</i> , 459 U.S. 116 (1982)	8, 12, 16
<i>Lawrence County v. Lead-Deadwood School District</i> , 469 U.S. 256 (1985)	20
<i>Massachusetts v. Mellon</i> , 262 U.S. 447 (1923)	22-24
<i>National League of Cities v. Usery</i> , 426 U.S. 833 (1976)	22
<i>New York State Liquor Authority v. Bellanca</i> , 452 U.S. 714 (1981)	5, 6
<i>Oklahoma v. United States Civil Service Comm'n</i> , 330 U.S. 127 (1947)	21-22
<i>Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico</i> , 106 S. Ct. 2968 (1986)	14
<i>Republican College Council v. Winner</i> , 357 F. Supp. 739 (E.D. Pa. 1973)	14
<i>State Board of Equalization v. Young's Market Co.</i> , 299 U.S. 59 (1936)	9, 10, 11, 12, 14
<i>Steward Machine Co. v. Davis</i> , 301 U.S. 548 (1937)	22-24
<i>324 Liquor Corp. v. Duffy</i> , 55 U.S.L.W. 4094 (U.S. Jan. 13, 1987)	15-16, 17
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	22
<i>United States v. Jackson</i> , 390 U.S. 570 (1968)	21
<i>William Jameson & Co. v. Morgenthau</i> , 307 U.S. 171 (1939)	9
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971) ..	16
<i>Ziffrin, Inc. v. Reeves</i> , 308 U.S. 132 (1939)	14
<i>Constitutional Provisions and Statutes</i>	
U.S. Const. amend. X	22
U.S. Const. amend. XXI	passim
23 U.S.C. § 154	24
Cal. Const. art. XX, § 22	14
Mich. Const. art. 4, § 40	14
Mont. Const. art. II, § 14	14
<i>Legislative Material</i>	
76 Cong. Rec. 4138 (1933)	7
76 Cong. Rec. 4147 (1933)	7, 14-15

TABLE OF AUTHORITIES—Continued

Page

76 Cong. Rec. 4164 (1933)	17
130 Cong. Rec. S8207 (1984)	24
130 Cong. Rec. S8209 (1984)	20
130 Cong. Rec. S8221 (1984)	18
130 Cong. Rec. S8222 (1984)	23
130 Cong. Rec. S8241 (1984)	24
130 Cong. Rec. H5396 (1984)	24
130 Cong. Rec. H5397 (1984)	24
130 Cong. Rec. H5398 (1984)	20
130 Cong. Rec. H5400 (1984)	21

Miscellaneous

Advisory Commission on Intergovernmental Relations, <i>Significant Features of Fiscal Federalism</i> (1986)	23
Brief of Amici Curiae for the States of Colorado, Hawaii, Louisiana, Montana, Ohio, South Carolina, Vermont and Wyoming, <i>South Dakota v. Dole</i> , cert. granted, 107 S. Ct. 567 (1986)	24
Comment, <i>The Politics and Consequences of the New Drinking Age Law</i> , 13 Fla. St. U. L. Rev. 847 (1985)	18
Males, <i>The Minimum Purchase Age for Alcohol and Young-Driver Fatal Crashes: A Long-Term View</i> , 15 J. Legal Stud. 181 (1986)	18
Note, <i>The Surface Transportation Assistance Act: Federalism's Last Stand?</i> , 11 Vt. L. Rev. 203 (1986)	14, 23
Working Group on Federalism of the Domestic Policy Council, <i>The Status of Federalism in America</i> (Nov. 1986)	24-25

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-260

STATE OF SOUTH DAKOTA,
v. *Petitioner,*ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION,
*Respondent.*On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit**BRIEF OF AMICI CURIAE
NATIONAL BEER WHOLESALERS' ASSOCIATION
AND 46 STATE BEER, WINE, AND
DISTILLED SPIRITS ASSOCIATIONS
IN SUPPORT OF PETITIONER****STATEMENT OF INTEREST OF AMICI CURIAE**

The National Beer Wholesalers' Association (NBWA) is a not-for-profit corporation organized under the laws of the Commonwealth of Virginia. It was founded in 1938 to promote the general welfare of the independent distribution segment of the malt beverage industry of the United States. NBWA has over 1900 beer wholesaler members, with representation in each of the fifty States, including South Dakota. Together with NBWA associate members in the brewing, importing, and related segments of the industry, NBWA membership accounts for over ninety percent of the malt beverages sold in the United States. The 46 state beer, wine, and distilled spirits as-

sociations joining as amici represent various segments of the alcoholic beverage industry at the state level.¹

Amici have a vital interest in the correct interpretation of the Twenty-first Amendment and the appropriate allocation of regulatory authority between the States and the Federal Government with respect to malt beverages. The resolution of this case will have a direct impact on amici, and the case also presents important issues concerning the Twenty-first Amendment and state-federal

¹ The 46 state associations are: Alabama Wholesale Beer and Wine Association, Arizona Wholesale Beer and Wine Association, Wholesale Beer Distributors of Arkansas, Inc., California Beer and Wine Wholesalers Association, Inc., Colorado Beer Distributors Association, Connecticut Beer Wholesalers Association, Beer Industry of Florida, Inc., Georgia Beer Wholesalers Association, Inc., Idaho Beer and Wine Distributors Association, Inc., Associated Beer Distributors of Illinois, Indiana Beverage Alliance, Inc., Iowa Wholesale Beer Distributors Association, Kansas Beer Wholesalers Association, Inc., Kentucky Beer Wholesalers Association, Inc., Beer Industry League of Louisiana, Wine and Spirits Foundation of Louisiana, Louisiana Beer Wholesalers Association, Maine Beer and Wine Wholesalers Association, Inc., Maryland Beer Wholesalers Association, Inc., Massachusetts Wholesalers of Malt Beverages, Inc., Michigan Beer and Wine Wholesalers Association, Minnesota Beer Wholesalers Association, Inc., Mississippi Malt Beverage Association, Missouri Beer Wholesalers Association, Montana Beer and Wine Wholesalers Association, Nebraska Beer Wholesalers Association, Nevada Beer Wholesalers Association, Beer Wholesalers Association of New Jersey, New York State Beer Wholesalers Association, Inc., North Carolina Beer Wholesalers Association, North Dakota Beer Wholesalers Association, Wholesale Beer and Wine Association of Ohio, Oklahoma Malt Beverage Association, Oregon Beer and Wine Distributors Association, Inc., Malt Beverage Distributors Association of Pennsylvania, Inc., Pennsylvania Beer Wholesalers Association, South Carolina Beer Association, South Dakota Beer Wholesalers Association, Tennessee Malt Beverage Association, Inc., Wholesale Beer Distributors of Texas, Utah Beer Wholesalers Association, Vermont Wholesale Beverage Association, Washington Beer and Wine Wholesalers Association, West Virginia Beer Wholesalers Association, Wisconsin Wholesale Beer Distributors Association, Inc., and Wyoming Beer Distributors Association.

relations with ramifications far beyond the particular facts. This brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

The Twenty-first Amendment is the only explicit grant of authority to the States in the Constitution. In many respects it is the mirror image of the Commerce Clause. Just as the Commerce Clause is an explicit grant of authority to Congress and an implicit limitation on the authority of the States, so too the Twenty-first Amendment is an explicit grant of authority to the States and an implicit limitation on the authority of Congress. The Commerce Clause does not prohibit the States from engaging in any regulatory activity that affects interstate commerce, but there is a core area in which the States may not act. By the same token, the Twenty-first Amendment does not prohibit Congress from engaging in any regulatory activity that affects alcoholic beverages, but there is a core area in which Congress may not act. Establishment of a minimum drinking age is clearly within any conception of the core powers reserved to the States by the Twenty-first Amendment.

The Twenty-first Amendment allocates authority between the States and the Federal Government; it does not implement any substantive national policy with respect to alcoholic beverages. This Nation experimented with such a national policy during Prohibition, and that experiment—whether “noble” or not—was a failure. The Government nonetheless argues that “promoting temperance” was “the center of the concern of the drafters of the Amendment.” Brief for the Respondent in Opposition (“Opp. Br.”) at 14 n.6. The Twenty-first Amendment, however, was adopted to *repeal* such a national policy, not to promote it. The purpose of the Amendment is not to promote temperance, but to leave such decisions to the States.

In this case South Dakota has undertaken to address the issue of drinking by young adults by gradually intro-

ducing them to alcoholic beverages—permitting those over nineteen to drink low-alcohol beer, but not to drink other alcoholic beverages until age twenty-one. Such an approach may or may not prove to be effective for other States, but it is effective in South Dakota, and that State is entitled to experiment with just such innovative approaches to this troublesome problem. Congress has responded to the same issue of drinking by young adults by seeking to re-enact prohibition for those aged eighteen to twenty-one. The question is not which approach is better, but whether the Twenty-first Amendment vests the authority to make such policy choices in Congress or in the individual States.

The Twenty-first Amendment is not only a broad grant of authority to the States, but necessarily—in the core area—a limitation on congressional authority as well. Congress cannot circumvent such a limitation on its power by seeking to impose a national minimum drinking age through the spending power, any more than it could by proceeding under any other grant of authority.

The Government contends that there is no conflict between South Dakota's law permitting nineteen-year-olds to purchase low-alcohol beer and the Federal statute penalizing States that permit those under twenty-one to purchase any alcoholic beverages. *Opp. Br.* at 11-12. This argument not only overlooks the limitation on congressional authority in the Twenty-first Amendment, but also ignores the realities of the Federal budget process. Those realities have changed dramatically in the half-century since this Court's broadest pronouncements on the scope of congressional power under the Spending Clause—pronouncements on which the Government relies. Whatever may have been the case fifty years ago, States are no longer entirely free to forego needed Federal funds to avoid the accompanying conditions. This Court should not sanction an intrusion on state authority by Congress simply because Congress proceeds indirectly under the Spending Clause.

ARGUMENT

I. The Twenty-first Amendment Reserves to the States the Authority to Set Minimum Drinking Ages

This Court has frequently emphasized that the Twenty-first Amendment is a significant grant of authority to the States, and that it is not merely surplusage in areas in which the States could rely upon their general police powers. "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972). In *La Rue*, the Court upheld a state prohibition on lewd entertainment in establishments that served alcoholic beverages, in light of "the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires." *Id.* at 118-119.

The Court relied upon this same analysis in a more recent decision upholding a state ban on nonobscene nude dancing in establishments licensed to sell liquor. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981). Serious questions might be raised concerning the State's authority under the police power to prohibit such dancing, but "[w]hatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment." *Id.*

Earlier this Term the Court reaffirmed the reasoning of *LaRue* and *Bellanca*. In *City of Newport v. Iacobucci*, 107 S. Ct. 383 (1986), the Court upheld a municipal regulation prohibiting nude dancing in establishments licensed to sell liquor. The Court quoted extensively from *LaRue* and concluded that "previous decisions

of this Court have established that, in the context of liquor licensing, the Amendment confers broad regulatory powers on the States." *Id.* at 385. The Court's decision was based expressly on "'the added presumption in favor of the validity of the . . . regulation in this area that the Twenty-first Amendment requires.'" *Id.* at 386 (quoting *LaRue*, 409 U.S. at 118-119).

In light of the foregoing, it is clear that the Government is mistaken in maintaining that the "Twenty-first Amendment is not the source of the State's authority to regulate the liquor industry" and that "the Amendment simply removes otherwise applicable Commerce Clause limitations" on the States. *Opp. Br.* at 9. As *LaRue*, *Bellanca*, and now *Iacobucci* plainly establish, the Twenty-first Amendment confers "something more than the normal state authority" with respect to alcoholic beverages. *LaRue*, 409 U.S. at 114; *see Bellanca*, 452 U.S. at 718; *Iacobucci*, 107 S. Ct. at 385. Regardless of whether the States have the general authority to set drinking ages in the absence of the Amendment, the Amendment provides added, constitutional authority for such regulation, and this added authority cannot be ignored in considering efforts to override state regulation in this area. *LaRue*, *Bellanca*, and *Iacobucci* also refute the Government's argument that the Twenty-first Amendment does nothing more than remove Commerce Clause restrictions on the States. There was no Commerce Clause issue in any of those cases, and yet the Court based its decision in each on the authority conferred by the Twenty-first Amendment.

In addition to conferring constitutional authority on the States, the Twenty-first Amendment, as a corollary, restricts the authority of Congress. This Court has stated that the Amendment "reserved to the States certain power to regulate traffic in liquor," *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) (emphasis supplied), and has frequently

referred to "the powers reserved by the Twenty-first Amendment." *E.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-276 (1984). Such a reservation of authority to the States necessarily entails a limitation on the authority of Congress.² When a State acts pursuant to the powers reserved to it under the Twenty-first Amendment, it does so under a direct grant of authority in the Constitution itself, and the normal operation of the Supremacy Clause does not apply.³

This is not to say that any state regulation involving alcoholic beverages automatically prevails over conflicting Federal legislation. In resolving any such conflicts this Court first considers whether the state regulation implicates interests at the core of the Twenty-first Amendment. If it does, the state regulation must prevail, since the Amendment is a constitutional limitation that Congress cannot override by mere legislation. If the state regulation does not implicate interests at the core of the Amendment, the court will proceed to balance the competing Federal and state interests in a "pragmatic effort

² As originally proposed, the Twenty-first Amendment contained a third section providing that "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138 (1933). Senator Wagner objected to this provision, arguing that "we have expelled the system of national control through the front door . . . and readmitted it forthwith through the back door of section 3." *Id.* at 4147 (1933). The deletion of this provision prior to passage of the Amendment indicates that the Amendment, as passed, was intended as a limitation on congressional authority as well as a grant of authority to the States.

³ *See Castlewood International Corp. v. Simon*, 596 F.2d 638, 642 (5th Cir. 1979) (Twenty-first Amendment "is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product—intoxicating liquors"), *vacated and remanded*, 446 U.S. 949, *opinion reinstated*, 626 F.2d 1200 (1980).

to harmonize state and federal powers." *Midcal*, 445 U.S. at 109.

The clearest statement of this approach is found in this Court's opinion in *Midcal*:

The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish *other* liquor regulations, *those* controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." [*Id.* at 110 (emphasis supplied) (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)).]

Balancing of Federal and state interests is appropriate only with respect to "*other* liquor regulations"; regulations concerning "importation or sale of liquor"—the core interests of the Twenty-first Amendment—are not subject to balancing, but are rather within the "virtually complete control" of the State.⁴

The decisions of this Court from the earliest days of the Twenty-first Amendment support the approach, summarized in *Midcal*, of a core area reserved for state regulation, with a balancing of Federal and state interests outside the core. The jurisprudence of the Twenty-first Amendment is often described as developing in distinct stages. According to this view, the Court recognized broad state power in cases decided shortly after ratifica-

⁴ The qualification "virtually" cannot be read to refer to any limitation imposed by legislation enacted by Congress pursuant to the commerce power or any other grant of authority. Such limitations apply only to "*other* liquor regulations," not those dealing directly with importation or sale. The qualification rather refers only to the explicit limitations on any exercise of state authority found in the Constitution itself, such as the First Amendment, see *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 133 n.5 (1982), or the Equal Protection Clause, see *Craig v. Boren*, 429 U.S. 190, 204-209 (1976).

tion of the Amendment, altered its approach in 1964, and since that time has been increasingly receptive to claims of Federal power in the area. Such a theory, however, does not accurately describe this Court's decisions. From the earliest cases, through those decided in 1964, to the present, the Court has upheld plenary state authority in the core area of the Amendment, and balanced Federal and state interests only outside the core.

In *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62 (1936), the Court upheld a state fee on beer imports that "would obviously have been unconstitutional" prior to adoption of the Amendment. Justice Brandeis noted for the Court that the language of the Amendment was clear and conferred upon the State broad power to govern imports of alcoholic beverages. Regulation of imports is clearly at the core of the Twenty-first Amendment, and in that area the Court declined "to limit [the] broad command" of the constitutional provision. *Id.*

Less than three years later, however, the Court upheld the Federal Alcoholic Administration Act, which regulated the labeling of alcoholic beverages imported into the United States, against the charge that "the Twenty-first Amendment . . . gives to the States complete and exclusive control over commerce in intoxicating liquors" *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 172-173 (1939). Labeling did not implicate the core values of the Amendment, and accordingly Federal regulation in that area was permissible. From the outset, then, the Court recognized a distinction between the State's plenary power with respect to the core of the Twenty-first Amendment—importation, delivery, and sale—and continuing Federal authority outside the core.

This approach did not suddenly change on June 1, 1964, when the Court decided *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, *supra*, and *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

The former case held that the Twenty-first Amendment did not authorize the State of New York to prevent a company from purchasing alcoholic beverages outside the State and selling them to departing international air travellers. The transactions were constantly supervised by Federal Customs officials to prevent diversion of the beverages to domestic channels. Justice Stewart's opinion for the Court began by reaffirming that the view expressed in *Young's Market* "of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned." 377 U.S. at 330. Justice Stewart went on to state that to conclude "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification." *Id.* at 331-332.

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case. [*Id.* at 332.]

These later comments have been frequently quoted out of context as justification for restricting state authority under the Twenty-first Amendment. As Judge Friendly has noted, however, "the actual decision was the unsurprising one . . . that the Amendment did not empower New York to prohibit the sale at John F. Kennedy International Airport of tax-free liquor for 'ultimate delivery and use . . . in a foreign country.'" *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166, 169 (2d Cir. 1984) (quoting *Idlewild Bon Voyage Liquor*, 377 U.S. at 333), *cert. denied*, 470 U.S. 1027 (1985).²

² That there was nothing surprising about the decision is confirmed by noting that the holding was expressly predicated on

Idlewild Bon Voyage Liquor thus involved state regulation of liquor purchased outside the State, destined for use outside the country, with no possibility of diversion for use within the State. The core interest of the Twenty-first Amendment in authorizing States to regulate liquor "for delivery or use" within the State was simply not implicated. The Court itself emphasized this distinction:

Here, ultimate delivery and use is not in New York, but in a foreign country. . . . As the District Court emphasized, this case does not involve "measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York." [*Id.* at 333-334 (quoting 212 F. Supp. 376, 386 (S.D.N.Y. 1962) (three-judge court))].

The broad language of the opinion, therefore, should not be taken out of context as suggesting that *ad hoc* "balancing" is appropriate in a case, such as the present one, that *does* involve regulation of the use of alcoholic beverages within the State. As the Court itself reaffirmed, in such a case the approach of *Young's Market* "has remained unquestioned." 377 U.S. at 330.

Department of Revenue v. James B. Beam Distilling Co., *supra*, decided the same day as *Idlewild Bon Voyage Liquor*, also contains broad language that has on occasion been taken out of the very limited context in which it arose. In that case the Court held that the Twenty-first Amendment did not permit Kentucky to tax liquor imported from Scotland in violation of the Export-Import Clause. Justice Stewart, again writing for the Court, rejected the argument that "the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned." 377 U.S. at 345 (footnote

Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938), decided shortly after ratification of the Amendment and considered not at all inconsistent with *Young's Market*. See 377 U.S. at 332-333.

omitted). Outside this limited area of a precise constitutional restriction on any state authority, however, Justice Stewart once again reaffirmed the broad power of the States under the Amendment:

We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. [*Id.* at 346 (emphasis supplied).]

This "plenary power" under the Twenty-first Amendment is, like any Federal or state power, limited by express restrictions on its exercise found in the Constitution. In this respect, *James B. Beam* simply foreshadowed cases such as *Larkin v. Grendel's Den, Inc.*, *supra*, and *Craig v. Boren*, *supra*. This certainly does not mean, however, that the plenary power may be circumscribed in the core area by mere legislation enacted by Congress.⁴

Both *Idlewild Bon Voyage Liquor* and *James B. Beam* recognized, as this Court noted in *Midcal*, that "important federal interests in liquor matters survived the ratification of the Twenty-first Amendment." 445 U.S. at 108. Neither case, however, suggested that Federal leg-

⁴ The principle that a State's exercise of its plenary power in the core area of the Twenty-first Amendment is limited by express provisions of the Constitution was again not a novel proposition that suddenly emerged in 1964. See *Young's Market*, 299 U.S. at 64 ("The plaintiffs insist that to sustain the exaction of the importer's license-fee would involve a declaration that the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization").

islation could override state power in the core areas reserved to the States by the Amendment.

This Court's more recent decisions continue to recognize plenary state authority in the core area, while balancing Federal and state interests outside the core. In *Capital Cities Cable, Inc. v. Crisp*, *supra*, for example, the Court held that Federal law pre-empted a state ban on liquor advertising on cable television. The question, according to the Court, was "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." 467 U.S. at 714. Regulating advertising on interstate media was not directly related to the core powers reserved to the States—governing importation, sale, and distribution of alcoholic beverages within the State—and accordingly a balancing of the Federal and state interests was appropriate.

The Court in *Crisp* was careful to draw a distinction between state regulation in the core area and the advertising ban at issue: "In contrast to state regulations governing the conditions under which liquor may be imported or sold within the State, . . . the application of Oklahoma's advertising ban to the importation of distant signals by cable television operators engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" 467 U.S. at 715 (quoting *Midcal*, 445 U.S. at 110). The Court has thus recognized that "the conditions under which liquor may be . . . sold within the State" directly implicate "the central power reserved by § 2 of the Twenty-first Amendment."

The most basic "condition[] under which liquor may be . . . sold within the State" is of course the estab-

lishment of a minimum age for purchasers. Every State sets a drinking age, some States going so far as to establish the age in their constitutions. See, e.g., Cal. Const. art. XX, § 22; Mich. Const. art. 4, § 40; Mont. Const. art. II, § 14. Minimum drinking ages have uniformly been upheld by the courts.⁷ Indeed, it is difficult to imagine a more basic exercise of authority under the Twenty-first Amendment, apart from the decision whether to permit *anyone* to purchase alcoholic beverages within the State.⁸ It is therefore not surprising that the issue of the age at which alcoholic beverages may be purchased figured in the debates on the Amendment. Senator Wagner successfully argued against the proposal to give Congress concurrent regulatory authority under the Amendment by noting:

If Congress may regulate the sale of intoxicating liquors where they are to be drunk on premises where sold, then we shall probably see Congress attempt to declare during what hours such premises may be open, where they shall be located, how they

⁷ See, e.g., *Gabree v. King*, 614 F.2d 1 (1st Cir. 1980); *Republican College Council v. Winner*, 357 F. Supp. 739 (E.D. Pa. 1973); *Houser v. State*, 85 Wash.2d 803, 540 P.2d 412 (1975).

⁸ See Note, *The Surface Transportation Assistance Act: Federalism's Last Stand?*, 11 Vt. L. Rev. 203, 222 (1986) ("If a state may prohibit possession of alcoholic beverages within its territory, then that state should be permitted to determine the age at which one may lawfully purchase alcohol") (footnote omitted). It is undoubted that a State may prohibit the purchase of alcoholic beverages, see *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), and "[s]urely the State may adopt a lesser degree of regulation than total prohibition." *Young's Market*, 299 U.S. at 63. Establishment of a minimum drinking age is an exercise of a lesser power included in the undisputed authority to ban alcoholic beverages altogether, and can no more be overridden by conflicting Federal provisions than could such a complete prohibition. Cf. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 106 S. Ct. 2968, 2978-79 (1986).

shall be operated, the sex and *age of the purchasers*, the price at which the beverages are to sold. [76 Cong. Rec. 4147 (1933) (emphasis supplied).]

A minimum drinking age thus clearly implicates "the State's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold." *Crisp*, 467 U.S. at 716. If state laws concerning who may and may not purchase alcoholic beverages are not at the core of the Twenty-first Amendment, the Amendment must have a slim core indeed.

This is not a case concerning regulation outside the State and thus beyond the core, as in *Idlewild Bon Voyage Liquor* or the more recent decision in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080 (1986).⁹ Nor is it a case involving peripheral interests, such as the advertising regulation at issue in *Crisp*, the promotion of local industry at issue in *Bacchus Imports, Ltd. v. Dias*, or the asserted interest in protecting small retailers at issue in *324 Liquor Corp. v. Duffy*, 55 U.S.L.W. 4094 (U.S. Jan. 13, 1987).¹⁰

⁹ In *Brown-Forman* the Court struck down a New York law affecting liquor prices in other States. As the Court noted, the Twenty-first Amendment "gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other states." 106 S. Ct. at 2088. The South Dakota regulation at issue in this case, of course, applies solely to sales in South Dakota.

¹⁰ In *Bacchus* the Court struck down a state tax exemption for a locally-produced liquor, and in *324 Liquor* the Court invalidated a resale price maintenance scheme. In both cases the Court, quoting from *Crisp*, framed the issue as "'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'" *Bacchus*, 468 U.S. at 275-276, and *324 Liquor*, 55 U.S.L.W. at 4098 (quoting 467 U.S. at 714). The Court's conclusion in *Bacchus* that the "central purpose of the [Amendment] was not

Finally, this is not a case in which state authority under the Amendment is exercised in a manner that contravenes an express limitation found elsewhere in the Constitution, as in *James B. Beam* and more recent cases such as *Larkin v. Grendel's Den, Inc.*, *supra*, *Craig v. Boren*, *supra*, or *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). No previous case has involved such a core interest under the Twenty-First Amendment as the question of the age at which liquor may be purchased within the State.

The Government contends that "the 'core' interest protected by the Twenty-first Amendment is in fact the State's interest in promoting temperance." Opp. Br. at 14. According to the Government, South Dakota cannot rely on the Twenty-first Amendment to support its minimum drinking age because the Federal Government seeks to impose a higher age. The central purpose of the Amendment, however, is not to promote temperance, but to leave such questions to the States. See *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 47 (1966) ("nothing in the Twenty-first Amendment . . . requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance"); *Battipaglia*, 745 F.2d at 178 ("Promotion of temperance is not the only interest reserved to the states by § 2 of the Twenty-first Amendment").¹¹ It would be an odd re-

to empower States to favor local liquor industries by erecting barriers to competition," 468 U.S. at 276, and its conclusion in *324 Liquor* that the Amendment does not protect "private, unsupervised price fixing," 55 U.S.L.W. at 4099, certainly do not detract from the statement in *Crisp* that the "central power" does include regulation of "the times, places, and manner under which liquor may be imported and sold." 467 U.S. at 716.

¹¹ Nowhere in any of the cases on which the Government relies, see Opp. Br. at 10 n.3, did this Court imply that the promotion of temperance was the central concern of the Twenty-first Amendment. Quite the contrary, those cases clearly indicate that the Court does not regard the Amendment as so limited. In *Bacchus*,

sult if an Amendment passed to repeal the imposition of Federal temperance standards were interpreted as permitting Federal judges to uphold or invalidate state laws based on an assessment of whether they promote temperance. The core interest of the Twenty-first Amendment is not to promote temperance but rather to reserve to the States "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal*, 445 U.S. at 110.¹²

In any event, it is indisputable that South Dakota's minimum drinking age—like any minimum drinking age—is designed to promote temperance. In fact, the minimum drinking age has no other purpose, and the Government has not suggested that it does. This is not a case in which a state law affecting alcoholic beverages has some impermissible purpose or effect, and is beyond the protection of the Twenty-first Amendment for that reason. Contrast *324 Liquor*, *supra* (private price-fixing); *Midcal*, *supra* (same); *Bacchus*, *supra* (promotion of local business); *Crisp*, *supra* (infringement of commercial speech). The only objection that the Federal Government has to South Dakota's minimum drinking

468 U.S. at 276, for example, the Court noted that the State did not seek to justify the law at issue "on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment" (emphasis supplied). Similarly, in *Crisp*, the Court stated that "the central power reserved by § 2 of the Twenty-First Amendment" was "that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system'"—not merely promoting temperance. 467 U.S. at 715 (quoting *Midcal*, 445 U.S. at 110).

¹² The central concern during the ratification movement was not the promotion of temperance; "it was 'Beer by Christmas.'" 76 Cong. Rec. 4164 (1933) (Sen. Dickinson). The Amendment was ratified by the requisite thirty-sixth State on December 5, 1933. The many festivities surrounding that event were not celebrations of the virtues of temperance.

age is that it is not the same age as that chosen by the Federal Government itself.

In addition, it is far from clear that the approach of Congress to the issue of drinking by young adults is in any sense "better" than that of South Dakota. Statistical studies are inconclusive on whether raising the drinking age reduces alcohol-related traffic fatalities. Indeed, some studies have shown that raising the drinking age actually increases such fatalities:

It is clear from even a casual glance at the data from recent years, and abundantly clear from a detailed analysis, that states that have raised their drinking ages have suffered a net increase in fatal crashes most likely to involve drinking among drivers under the age of twenty-one compared to states that did not raise their drinking ages. The increase is too small to be statistically significant, but it is large enough to say with assurance that raised drinking ages do not deter fatal crashes by young drivers. [Males, *The Minimum Purchase Age for Alcohol and Young-Driver Fatal Crashes: A Long-Term View*, 15 J. Legal Stud. 181, 203 (1986).]

See also Comment, *The Politics and Consequences of the New Drinking Age Law*, 13 Fla. St. U. L. Rev. 847, 854 (1985) (citing Florida study showing increase in number of eighteen-year-old drivers involved in fatal accidents after state drinking age was raised from eighteen to nineteen); 130 Cong. Rec. S8221 (daily ed. June 26, 1984) (Sen. Symms). One analyst has suggested that the increase in fatalities among young adults shown in these studies may result from the fact that young adults "respond to the law changes by engaging in more dangerous and clandestine illegal drinking." Males, *supra*, 15 J. Legal Stud. at 204.

South Dakota introduces young adults to alcoholic beverages gradually, permitting those under twenty-one to drink only low-alcohol beer. Alcohol-related traffic

fatalities in South Dakota steadily declined from 1981 to 1983 by over thirty percent. App. to Pet. at A-45. Given its own experience, South Dakota could well have concluded that raising the drinking age might reverse this steady decline, as young adults excluded from drinking in public establishments took to the roads and highways of South Dakota to drink. Other States with different experiences and different geographic and social conditions might reach different conclusions. The virtue of the Twenty-first Amendment is that it authorizes each State to respond to its own unique circumstances, and also to experiment with approaches that may ultimately prove useful to other States as well.

The court below and the Government suggest that Congress is free to override the Twenty-first Amendment in this area because different drinking ages in neighboring States may increase the incidence of driving while intoxicated among young adults. App. to Pet. at A-10—A-11; Opp. Br. at 6 n.2. This argument proves too much. The same problem would exist if one State elected to enact prohibition, as it clearly is free to do. Yet surely it cannot be maintained that Congress would then have the authority to compel the dry State to permit drinking—or to compel its neighbors to prohibit it—to avoid the problem of residents of one State driving to another to drink. That is, however, precisely the argument the Government makes. Simply because several States have enacted prohibition for those aged 18 to 21, Congress—the Government contends—is free to compel other States to do the same. The drafters of the Twenty-first Amendment recognized that different States would enact different laws with respect to alcoholic beverages. The purpose of section two of the Amendment was to permit them to do so. The fact of differing regulations alone can thus hardly be cited as justification for overriding the amendment.

II. Congress May Not Avoid the Limitations on Its Power in the Twenty-first Amendment by Proceeding Under the Spending Power

The Government contends that any limitations in the Twenty-first Amendment are inapplicable to Congress's effort to impose a uniform national drinking age because Congress proceeded under the Spending Clause. See Opp. Br. at 10. According to the Government, the threatened loss of highway funds "is an incentive rather than a coercive measure." *Id.* at 11.

This Court has often noted that the Spending Clause is a broad grant of authority to Congress, but the Court has also reiterated that the authority is fully subject to other limitations in the Constitution. As the Court noted recently in *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 269-270 (1985), "Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar" (emphasis supplied). See *King v. Smith*, 392 U.S. 309, 333 n.34 (1968) (conditions may be imposed "unless barred by some controlling constitutional prohibition"); cf. *Buckley v. Valeo*, 424 U.S. 1, 91 (1976). The Twenty-first Amendment bars Congress from imposing a national minimum drinking age on the States, and Congress cannot avoid this "independent constitutional bar" by proceeding under its spending powers.

Under the Amendment, South Dakota has the constitutional right to set a minimum drinking age, free from Federal interference. The sole purpose of the challenged Federal statute is to interfere with South Dakota's exercise of that right and compel South Dakota to change its minimum drinking age. As the primary sponsor of the legislation frankly stated, "It is time to use the stick * * *." 130 Cong. Rec. S8209 (daily ed. June 26, 1984) (Sen. Lautenberg).¹³ This Court held in *United*

¹³ See also 130 Cong. Rec. H5398 (daily ed. June 7, 1984) ("I think it will send the necessary message to the State legislatures")

States v. Jackson, 390 U.S. 570, 581 (1968), that a law with "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them * * * [is] patently unconstitutional." Congress is not free to induce States to surrender their authority under the Constitution as a condition of receipt of Federal funds.¹⁴ As this Court has noted:

It is not necessary to challenge the proposition that, as general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. [*Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-594 (1926).]

Nothing in *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127 (1947), is to the contrary. In that case the Court upheld a Federal grant condition

(Rep. Lent); *id.* at H5400 ("This is just the first step on our part, and further steps will be forthcoming if there is not an adequate response") (Rep. Levin).

¹⁴ The Government dismisses these concerns by stating that "the inability to have one's cake and eat it too does not demonstrate coercion." Opp. Br. at 11 n.4. This Court, however, has rejected the Government's gastronomic analogy with one of its own, noting in an analogous context that "it is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). The fact that Congress could eliminate the highway grant program entirely does not give it the right to insist on forfeiture of state authority under the Twenty-first Amendment as a condition of participation.

limiting the political activities of certain state officials, even though Congress did not have the authority to regulate those activities directly. The only bar to the condition asserted in that case, however, was the Tenth Amendment, which the Court noted was not interpreted (at that time) as a limitation on congressional authority.¹⁵ *Oklahoma*, therefore, provides no support for the proposition that Congress may circumvent a limitation on its authority—as opposed to a mere lack of authority—through the spending power. As noted, in the core area of the Twenty-first Amendment, that Amendment is a limitation on the power of Congress.

Amici recognize that this Congress has stated the broad proposition that a condition on the grant of Federal funds does not deny rights to the States, because the States may decline the funds. See *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923); *Steward Machine Co. v. Davis*, 301 U.S. 548, 593-598 (1937). As noted, this proposition is not applicable when, as here, the condition contravenes an independent limitation on congressional authority. In addition, while the proposition in its most general terms may have been valid when first announced, it requires reexamination in light of present-day realities.

Federal spending practices and state budgets have changed dramatically in the half century since *Mellon*

¹⁵ The Court quoted *United States v. Darby*, 312 U.S. 100, 124 (1941), for the proposition that “the Tenth Amendment has been consistently construed ‘as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.’” 330 U.S. at 143. This view of the Tenth Amendment changed with the decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), but was revived with the overruling of that decision in *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985). At the time *Oklahoma* was decided, as now, the Tenth Amendment was not a limitation on congressional authority.

and *Steward Machine Co.*, and today many if not all States are no longer at liberty to turn down funds absolutely essential to their economies.¹⁶ State and local governments now receive some \$24 in Federal funds for every \$100 they raise on their own. Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism* at 3, 19 (1986). In 1955, the figure was less than half that. *Id.* at 19. Federal funds have become an integral and major part of state budgets, and it is an increasingly hollow fiction that the States can avoid intrusions on their sovereignty in the form of conditions on the receipt of Federal funds simply by declining the funds.

For example, Texas would lose \$33.2 million in 1987 and \$66.4 million in 1988 if it did not comply with the national minimum drinking age. 130 Cong. Rec. S8222 (daily ed. June 26, 1984). New York would lose \$30.1 and \$60.2 million respectively. *Id.* To cover such a shortfall, States would almost certainly be compelled to reduce services in other areas.¹⁷ It is not beyond comprehension, for example, that among the law enforcement programs reduced would be those directed at drunk drivers. The point is that in this era of budgetary constraints, the Government’s effort to portray the threatened loss of Federal funds as a carrot rather than a

¹⁶ See Note, *supra*, 11 Vt. L. Rev. at 212-213 (“Most states can ill afford to lose federal dollars and, therefore, are literally forced into compliance in order to receive the federal benefits”) (emphasis in original).

¹⁷ South Dakota would lose \$4.2 million in 1987 and \$8.3 million in 1988. App. to Pet. at A-48. Such amounts are very significant for a State such as South Dakota. The total loss of \$12.5 million, for example, represents 25 percent of what the State of South Dakota spent on health and hospitals in 1984. It represents over 14 percent of spending in South Dakota in 1984 by all levels of government—state, local, county, and municipal—on police and fire protection. See *Significant Features of Fiscal Federalism*, *supra*, at 241.

stick—"an incentive rather than a coercive measure," Opp. Br. at 11—does not comport with the facts.

Congress knows this to be true.¹⁸ The States know it to be true.¹⁹ This Court need not be blind to the realities that shape the conduct of the other actors in the constitutional scheme, and need not characterize conditions on the receipt of Federal funds as "coercive" before recognizing that a State may well be forced to forfeit constitutional prerogatives—such as the right to establish within its own borders the age at which its citizens may purchase and possess alcoholic beverages—to comply with a Federal mandate.

The Government itself recently acknowledged the change in the realities of the budget process since the time of *Mellon* and *Steward Machine*, and the effect such changes have had on relations between the States and the Federal Government. In *The Status of Federalism in America: A Report of the Working Group on Federalism*

¹⁸ The debates leave little doubt that Congress viewed the threatened withholding of Federal funds as sufficient to establish a national minimum drinking age. See 130 Cong. Rec. S8207 (daily ed. June 26, 1984) ("the time has come for Congress to take action so that we will have a nationwide drinking age of 21") (Sen. Danforth); *id.* at S8241 ("we need a uniform national drinking age, and we need congressional action to that end") (Sen. Huddleston); 130 Cong. Rec. H5396 (daily ed. June 7, 1984) ("It is about time that we do have uniformity in this country and that we do have an age that is recognized nationally as the proper age at which alcohol consumption is legal") (Rep. Shaw); *id.* at H5397 ("Federal action is needed to establish a uniform nationwide drinking age of 21") (Rep. Florio).

Congress increasingly resorts to the expedient of imposing conditions on the receipt of Federal funds. See, e.g., 23 U.S.C. § 154 (national maximum speed limit). Both the Federal spending and the conditions were, of course, relatively rare fifty years ago.

¹⁹ See Brief of Amici Curiae for the States of Colorado, Hawaii, Louisiana, Montana, Ohio, South Carolina, Vermont and Wyoming, *South Dakota v. Dole*, cert. granted, 107 S. Ct. 567 (1986).

of the Domestic Policy Council (Nov. 1986), the Government acknowledged that States were generally "unable as a practical matter to refuse conditional funds, because "in most cases, it would lead to major reductions in state revenues" and because "a State's rejection of federal funds denies its citizens the benefits of a program that is supported by their tax dollars." *Id.* at 31, 36. The report recognized that "the net result of the massive increase in conditional funding in the last fifty years has been to give the national government power to oversee the States' compliance with a wide range of conditional grants, and thus to direct state policy in areas of traditional state concern and authority * * *." *Id.* at 35. As the report noted:

The last five decades have witnessed a dramatic rise in the number and size of federal programs under which Congress transfers money for certain purposes to state and local governments. With these transfers of federal money to the States have come equally sweeping transfers of sovereign governmental power in the opposite direction. [*Id.* at 30.]

Such "transfers of sovereign governmental power" may be matters for the political processes in most instances. In this case, however, the Twenty-first Amendment stands as a constitutional reservation of authority to the States, and a limitation on the power of Congress to intrude on state prerogatives concerning alcoholic beverages. At least with respect to such a core question under the Twenty-first Amendment as the drinking age, Congress is not free to impose its will on the States, either directly or through conditions on the receipt of funds the States cannot do without.

CONCLUSION

For the foregoing reasons, and those in Petitioner's brief, this Court should reverse the decision below.

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AMICUS CURIAE

BRIEF

No. 86-260

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FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF SOUTH DAKOTA,
v. *Petitioner,*

ELIZABETH H. DOLE,
SECRETARY OF TRANSPORTATION
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS,
NATIONAL GOVERNORS' ASSOCIATION,
AND NATIONAL ASSOCIATION OF COUNTIES
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the 1984 "National Minimum Drinking Age Amendment" to the Surface Transportation Assistance Act is a valid exercise of the spending power as a condition on the grant of federal highway funds or is a regulation that must be supported by one of Congress' delegated regulatory powers.

2. Whether the establishment of a national minimum drinking age is within Congress' delegated regulatory powers or is reserved to the States by the Tenth and Twenty-first Amendments.

3. Whether Congress may exercise one of its delegated regulatory powers by requiring the States to enact the desired legislation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT OF FACTS	2
LEGISLATIVE BACKGROUND	4
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. CONGRESS' POWER TO SPEND FOR THE GENERAL WELFARE DOES NOT AU- THORIZE IT TO REGULATE THROUGH CONDITIONS UNRELATED TO THE EX- PENDITURE OF FEDERAL FUNDS	12
A. The Validity Of Grant Conditions Should Not Be Determined By An Inquiry Focus- ing On The Distinction Between Coercion And Inducement	14
B. The Validity Of "Conditions" On A Grant Depends Upon Whether They Are Specifica- tions As To The Use Of The Grant Or An Attempted Regulation	18
C. The National Minimum Drinking Age Amendment Is Not A Condition On The Expenditure Of Federal Funds, But An At- tempted Regulation	21
II. THE NMDA IS NOT SUSTAINABLE AS AN EXERCISE OF ONE OF CONGRESS' DELE- GATED REGULATORY POWERS	24

TABLE OF CONTENTS—Continued

	Page
A. Congress Has No Power To Enact A Minimum Drinking Age Pursuant To The Commerce Clause Because It Is Limited By The Twenty-first Amendment	24
B. Congress Has No Power To Compel The States To Enact Legislation	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
<i>Attorney General of New York v. Soto-Lopez</i> , 106 S.Ct. 2317 (1986)	17
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	27
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980)	17, 18
<i>California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980)	25, 27
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984)	11, 26, 27
<i>Coyle v. Oklahoma</i> , 221 U.S. 559 (1911)	29
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	26
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	17
<i>EPA v. Brown</i> , 431 U.S. 99 (1977)	28
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982)	12, 16, 28, 29, 30
<i>Frost Trucking Co. v. Railroad Comm'n</i> , 271 U.S. 583 (1926)	18
<i>Fry v. United States</i> , 421 U.S. 542 (1975)	29
<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1980)	12, 22
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528 (1985)	19, 29
<i>Hammer v. Dagenhart</i> , 247 U.S. 251 (1918)	20
<i>Hannegan v. Esquire, Inc.</i> , 327 U.S. 146 (1946)	18
<i>Harris v. McRae</i> , 448 U.S. 297 (1980)	12, 22
<i>Hodel v. Virginia Surface Mining & Reclamation Assn.</i> , 452 U.S. 264 (1981)	16
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	28
<i>Lane County v. Oregon</i> , 74 U.S. (7 Wall.) 71 (1869)	20, 29
<i>Lau v. Nichols</i> , 414 U.S. 563 (1974)	12
<i>Maryland v. Wirtz</i> , 392 U.S. 183 (1968)	18-19
<i>M'Culloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	28
<i>National League of Cities v. Usery</i> , 426 U.S. 833 (1976)	19, 29
<i>Oklahoma v. United States Civil Service Comm'n</i> , 330 U.S. 127 (1947)	13
<i>Pennhurst State School v. Halderman</i> , 451 U.S. 1 (1981)	13
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972)	18

TABLE OF AUTHORITIES—Continued

	Page
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	17
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	18
<i>State Board of Equalization v. Young's Market Co.</i> , 299 U.S. 59 (1936)	27
<i>Steward Machine Co. v. Davis</i> , 301 U.S. 548 (1937)	10, 13, 16, 17, 20
<i>Thomas v. Review Board</i> , 450 U.S. 707 (1981)	17
<i>324 Liquor Corp. v. Duffy</i> , No. 84-2022 (U.S. Jan. 13, 1987)	11, 25, 26, 27
<i>United States v. Butler</i> , 297 U.S. 1 (1936)	12, 19, 20
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	20-21
<i>United States v. Frankfort Distillers, Inc.</i> , 324 U.S. 293 (1945)	26
<i>Washington v. Washington State Commercial Passenger Fishing Vessel Assn.</i> , 443 U.S. 658 (1979)	29
<i>William Jameson & Co. v. Morgenthau</i> , 307 U.S. 171 (1939)	26
<i>Woods v. Cloyd W. Miller Co.</i> , 333 U.S. 138 (1948)	20
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977)	18
<i>Zobel v. Williams</i> , 457 U.S. 55 (1982)	17

CONSTITUTIONAL PROVISIONS:

U.S. Const. Art. I, § 8, cl. 1, Spending Clause	<i>passim</i>
U.S. Const. Art. I, § 8, cl. 3, Commerce Clause	<i>passim</i>
U.S. Const. Amend. X	<i>passim</i>
U.S. Const. Amend. XXI	<i>passim</i>

STATUTES:

Act of July 14, 1984, Pub. L. No. 98-363, § 6, 98 Stat. 437-38, 23 U.S.C. (Supp. II) § 158	5
23 U.S.C. (Supp. II) § 158	<i>passim</i>
Child Passenger Safety Act of 1984, Pub. L. No. 98-363, 98 Stat. 435	4
Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, 23 U.S.C. § 101 <i>et seq.</i>	2-3, 4, 22
23 U.S.C. § 109	21

TABLE OF AUTHORITIES—Continued

	Page
23 U.S.C. § 127	21
23 U.S.C. § 142	21
23 U.S.C. § 148	21
Ala. Code § 28-1-5 (1986)	6
Ga. Code Ann. § 3-3-23 (1982)	6
S.D. Codified Laws Ann. § 35-6-27 (1986)	3

LEGISLATIVE MATERIALS:

H.R. Rep. No. 555, 97th Cong., 2d Sess. (1982)	22
H.R. Rep. No. 641, 98th Cong., 2d Sess. (1984)	4
76 Cong. Rec. (1933)	
4138	28
4147	28
130 Cong. Rec. H3162 (daily ed. April 30, 1984)	4
130 Cong. Rec. (daily ed. June 7, 1984)	
H5375	15
H5394	5
H5395	8, 23
H5396	7, 8
H5398	23
H5399	8
H5400	8
H5401	8
H5401-02	8
H5402	8
H5404	9
H5404-05	8
H5405	7
H5406	8
H5407	5
H5443-44	5
130 Cong. Rec. (daily ed. June 26, 1984)	
S8206	23
S8208-09	5
S8209	5, 6, 7, 8, 9, 10, 14
S8213	7, 9
S8214	8
S8216	8, 9, 14

TABLE OF AUTHORITIES—Continued

	Page
S8217	6
S8217-18	7
S8219	5, 8, 23
S8221	6
S8222	3, 7
S8223	5, 9
S8224	6
S8225	8, 9
S8227	7
S8228	8
S8228-29	8
S8229	5
S8230	8
S8231	9
S8232	9
S8234	7, 9
S8235	9
S8236	6, 8
S8237	8, 9
S8238	7
S8238-39	8
S8239	6, 8
S8240	7
S8241	8
S8243	8, 9
S8243-44	9
S8244	9
S8245	9
S8246	9

LAW REVIEW ARTICLES:

Comment, <i>The Federal Conditional Spending Power: A Search For Limits</i> , 70 Nw. U.L. Rev. 293 (1975)	15
Kaden, <i>Politics, Money, and State Sovereignty: The Judicial Role</i> , 79 Colum. L. Rev. 847 (1979)	15, 20
Kreimer, <i>Allocational Sanctions: The Problem of Negative Rights in a Positive State</i> , 132 U. Pa. L. Rev. 1293 (1984)	18

TABLE OF AUTHORITIES—Continued

	Page
Stewart, <i>Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy</i> , 86 Yale L. J. 1196 (1977)	15, 16

OTHER AUTHORITIES:

National Transportation Safety Board, <i>Safety Recommendation H-82-18</i> (July 22, 1982)	6
Report of the Working Group on Federalism of the Domestic Policy Council, <i>The Status of Federalism in America</i> (Nov. 1986)	1-2, 13, 15

**BRIEF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS,
NATIONAL GOVERNORS' ASSOCIATION,
AND NATIONAL ASSOCIATION OF COUNTIES
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case concerns the requirement, imposed as a condition of each State's eligibility to receive certain federal highway funds, that the State prohibit "the purchase or public possession" of any alcoholic beverage by a person under twenty-one years of age.

Although masquerading as a spending condition, the requirement is actually intended to regulate the States and the people within them. Such regulation not only intrudes on the States' core powers under the Twenty-first Amendment to control the sale and distribution of liquor within their borders, but also usurps the States' reserved sovereignty under the Tenth Amendment to enact their own laws regarding local matters.

The "National Minimum Drinking Age Amendment" regulates in the guise of imposing a condition on the receipt of federal funds. Unrelated spending conditions can destroy state autonomy by permitting Congress to legislate outside the limits of its delegated regulatory powers. Such conditions constitute a fundamental subversion of our constitutional system, which bestowed limited powers on the federal government and reserved all other regulation of private activity to the States.

A recent report by the Working Group on Federalism of the President's Domestic Policy Council on "The Status of Federalism in America" (November 1986) ("*Federalism Report*") lamented that (*id.* at 30):

[t]he last five decades have witnessed a dramatic rise in the number and size of federal programs un-

der which Congress transfers money for certain purposes to state and local governments. With these transfers of federal money to the States have come equally sweeping transfers of sovereign governmental power in the opposite direction. Congress' exercise of the spending power has essentially redefined the relationship between the national government and the governments of the States, undermining the sovereign governing authority of the latter

As the Report explains, Congress' increasing use of conditional grants results in higher national taxes and makes it more difficult for state and local governments to raise needed revenue. Their fiscal independence is undercut, and they become more dependent upon the federal contribution. Moreover, requirements for matching funds from the States "reduce the amount available to address other matters of intense local concern." *Id.* at 36. The Report concludes ruefully: "The States may thus gradually cease to serve as experimental laboratories in which creative solutions are developed for problems of local concern." *Ibid.* As the Report suggests, citing this case (*id.* at 35 & nn. 139-40), appeals by the States for judicial protection from the federal accretion of power through unrelated spending conditions are vital to the defense of state sovereignty. So long as Congress seeks to use its spending power as an instrument of regulation, the States must rely on this Court to contain it within constitutional bounds.

Amici submit that the decision below is erroneous. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.¹

STATEMENT OF FACTS

The "National Minimum Drinking Age Amendment" ("NMDA" or "the amendment") to the Surface Trans-

¹ Pursuant to Rule 36 of Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

portation Assistance Act of 1982 (Pub. L. No. 97-424, 96 Stat. 2097) requires the States, as a condition of receiving a part of their apportioned federal highway aid, to prohibit the purchase or public possession of alcoholic beverages by persons under twenty-one years of age. 23 U.S.C. (Supp. II) § 158. South Dakota prohibits the consumption of all alcoholic beverages except "low-point beer" by persons under age twenty-one. S.D. Codified Laws Ann. § 35-6-27 (1986). Because it has determined to structure the system for the sale and distribution of alcohol within the State to allow nineteen- and twenty-year-olds to purchase low-point beer, South Dakota now faces the loss of almost \$12.5 million in federal highway construction funds. See Complaint ¶ XXI, Pet. App. A48; 130 Cong. Rec. S8222 (daily ed. June 26, 1984).² The fact that South Dakota has achieved a thirty-percent drop in alcohol-related traffic fatalities from 1981 to 1983 (see Complaint ¶ XII, Pet. App. A45) is irrelevant to eligibility for receipt of those funds. The NMDA mandates the withholding of funds simply because of the existence of § 35-6-27 of the Codified Laws of the State.

South Dakota sued to challenge the constitutionality of the NMDA under the Tenth and Twenty-first Amendments. The district court dismissed the complaint for failure to state a claim upon which relief could be granted, and the Eighth Circuit Court of Appeals affirmed. Noting that Congress' power under the Spending Clause is not unlimited and that "any conditions imposed by Congress must be reasonably related to the national interest Congress seeks to advance" (Pet. App. A8), the court nevertheless held (*id.* at A12-A13; emphasis added):

Congress reasonably could have concluded the *problem of young adults drinking and driving* is not a purely local or intrastate concern but rather is a *concern of interstate and national proportions*. We further believe Congress, in its reasoned discretion,

² All citations to the Senate debates are to 130 Cong. Rec. (daily ed. June 26, 1984) and will be cited herein only by page number.

could determine that a uniform minimum drinking age would lessen that problem and improve the safety of our nation's highways for all Americans. Finally, we conclude *Congress's decision* to condition a portion of a state's federal highway funds on the adoption of a minimum drinking age of twenty-one is *reasonably related to Congress's interest in achieving a nationally uniform minimum drinking age*.

The court rejected South Dakota's contention that the spending condition violated affirmative constitutional limitations imposed on Congress' authority by the Tenth and Twenty-first Amendments. The court held that the Twenty-first Amendment created an exception only to the normal operation of the Commerce Clause and "did not limit or withdraw Congress's ability to exercise authority under . . . the spending power" (*id.* at A16-A18). Nor was the federal law invalid on the basis that it was contrary to South Dakota's law because "no conflict exists" (*id.* at A19). Finally, the court held that the challenged condition did not offend the Tenth Amendment (*id.* at A20-A23).

LEGISLATIVE BACKGROUND

The issues in this case must be viewed against the backdrop of the legislative history of the NMDA. In 1984, the Senate considered H.R. 4616, the Child Passenger Safety Act of 1984, Pub. L. No. 98-363, 98 Stat. 435, designed as an amendment to the Surface Transportation Assistance Act of 1982. That bill contained authorizations of \$35 million over two years to fund expenditures required of the States to develop and implement comprehensive programs concerning the use of child restraint systems in motor vehicles. See H.R. Rep. No. 641, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 3 U.S. Code Cong. & Ad. News 627 (1984); 130 Cong. Rec. H3162 (daily ed. April 30, 1984) (remarks of Rep. Anderson).

On the floor of the Senate, Senator Lautenberg and others offered a multi-purpose amendment. The amendment first proposed to increase the authorization in the House bill by ten percent "to provid[e] incentive grants

to the States to encourage States to adopt mandatory sentencing laws to combat drunk driving in all age groups and to improve highway safety computer record-keeping systems and law enforcement efforts." S8208-09 (remarks of Sen. Lautenberg). The amendment also proposed to "establis[h] a uniform drinking age among the states" because state legislation to raise the drinking age had not "been responsive to incentive grants." S8209 (remarks of Sen. Lautenberg) (citation omitted).³

The NMDA directed the Secretary of Transportation to withhold a percentage of the highway construction funds apportioned to any State in which the purchase or public possession of alcoholic beverages by persons under the age of twenty-one was lawful.⁴ Unless such a State changed its law before the beginning of the applicable fiscal year, it would lose five percent in 1987, and ten percent in 1988, of its federal-aid highway funds. Act of July 14, 1984, Pub. L. 98-363, § 6, 98 Stat. 437-38, codified at 23 U.S.C. (Supp. II) § 158.

At the time that the bill was passed, twenty-three States had a minimum drinking age of twenty-one. See S8219 (remarks of Sen. Lautenberg). Between 1970 and 1974, roughly contemporaneously with the ex-

³ The amendment incorporated S. 2719, the Uniform Minimum Drinking Age Act. Companion legislation to S. 2719 had already passed the House. See S8209 (remarks of Sen. Lautenberg); 130 Cong. Rec. H5394, H5407, H5443-44 (daily ed. June 7, 1984). All subsequent citation to these House debates will be cited only by page numbers.

⁴ The NMDA does not condition the entitlement to a full share of federal funds on a minimum drinking age, but on the minimum age for the purchase or public possession of alcoholic beverages. Senator Symma noted that "[r]aising the legal drinking age has no effect on the actual drinking age" (S8223). In addition, some of the statistics frequently cited for teenage accident and death rates attributed to alcohol do not indicate whether the accidents occurred in States where the drinking was legal or illegal. See S8229 (remarks of Sen. Mitchell). Our argument here, however, does not depend on the difference between "the purchase or public possession" and the consumption of alcoholic beverages. For convenience, we will use the shorthand reference to a minimum drinking age.

tension of voting rights to eighteen-year olds⁶ and the war in Vietnam,⁷ twenty-four States had lowered the drinking age from twenty-one.⁸ By the mid-1970s, in the face of rising accident rates, the trend began to be reversed; and the number of States with a drinking age below twenty-one began to decline.⁹ Since 1982, all but two States have tightened their drunk driving laws in some manner. See S8224 (remarks of Sen. Simpson). Within the year preceding the enactment of the NMDA, four States raised the drinking age, possibly in response to incentive grants provided by Congress; nineteen other States considered raising the drinking age but did not do so.¹⁰ A number of States have found that simply raising the drinking age does not lower the rates of accidents or fatalities among eighteen- to twenty-one-year-olds.¹¹ By contrast, the States with a comprehen-

⁶ See National Transportation Safety Board, Safety Recommendation H-82-18, 1 (July 22, 1982) ("NTSB Recommendation") (lodged with the Clerk for the Court's convenience).

⁷ See S8239 (remarks of Sen. Bumpers).

⁸ NTSB Recommendation 1.

⁹ *Id.* at 1-2.

¹⁰ See, e.g., S8209, S8217 (remarks of Sen. Lautenberg); S8224 (remarks of Sen. Simpson); S8236 (remarks of Sen. Danforth).

¹¹ Two years after raising the drinking age to 19, Florida recorded more alcohol-related deaths per capita among 18-year-olds. See S8221 (remarks of Sen. Symms). The increase cannot be attributed to border-hopping because Florida shares a border with no State in which the drinking age was less than 19 (see *ibid.*) or in which it was raised within the two-year period measured. See Ala. Code § 28-1-5 (1986); Ga. Code Ann. § 3-3-23 (1982). Montana, a similarly isolated State, experienced a 14% increase in nighttime fatality rates among 18-year-olds after raising its legal age of consumption to 19. See S8221 (remarks of Sen. Symms). Minnesota suffered a fourfold increase in deaths among 18- and 19-year-olds when the drinking age was raised to 19. In Michigan, alcohol-related crash rates for 18- to 20-year-olds increased 12% relative to rates for older drivers when the drinking age was increased to 21. See *ibid.* And in New Jersey, the death rate due to drunk driving tripled among those in the 16- to 20-year-old group when the drinking age was lowered from 21 to 18, but it was cut only in half when the age reduction was reversed. See S8209 (remarks of Sen. Lautenberg); S8239 (remarks of Sen. Bumpers).

sive approach to drunk driving and teenage drinking have been markedly successful.¹²

The legislative history of the NMDA discloses two distinct, albeit related, concerns of Congress arising from drinking by persons aged eighteen to twenty-one: first, they are involved in a disproportionate number of drunk driving accidents and fatalities, possibly because they are less experienced than other drivers¹³; and, second,

¹¹ South Dakota achieved a 30% reduction in alcohol-related traffic deaths by enforcement measures against drunk driving without raising the drinking age. See Complaint ¶ XII, Pet. App. A45. Senator Durenberger pointed out that Minnesota and Nebraska, both with a drinking age lower than 21 at the time, led the nation in reducing highway fatalities. See S8238. He credited Minnesota's reliance on an education and enforcement program with the 34% drop in fatalities over three years, stating that "[r]esults like these cannot be achieved by simply raising the drinking age of [sic] 21." *Ibid.*; see n.10, *supra*. Similarly, Montana, in which more 18-year-olds were killed after the drinking age was raised to 19 (see *ibid.*), stands to lose almost \$17 million under the NMDA because it has not raised the drinking age to 21 (see S8222); but Montana, through an extensive education program, and increased enforcement of "strict and unbending" laws against drunk driving, has achieved "a dramatic drop" in teenage fatalities. See S8213 (remarks of Sen. Baucus). Idaho, which has not raised the drinking age to 21 and thus stands to lose more than \$13 million because of the NMDA (see S8222), adopted a series of measures in 1983, making driving under the influence (DUI) illegal *per se* and significantly increasing the penalties for a number of DUI offenses. "[P]reliminary figures acknowledge the positive impact." *Ibid.* Maine found that "simply raising the age to drink will not stop young people from drinking and driving"; but the penalty of a one-year license suspension for drunk driving had "some real success." H5405 (remarks of Rep. Tauzin). See also S8217-18, S8234 (remarks of Sens. Leahy and Humphrey, describing Vermont's comprehensive efforts, which have lowered the percentage of alcohol-related fatalities from 55 to 39); S8227 (remarks of Sen. Evans describing the effectiveness of Washington State's comprehensive efforts).

¹² See S8209 ("The combination of alcohol, driving, and youth is deadly.") (remarks of Sen. Lautenberg); S8240 ("Add to the problem of drinking and driving the extra peril of an inexperienced driver—the teenager—and the problem is compounded . . .") (remarks of Sen. Hawkins). See also H5396 ("At the ages of 18, 19, 20, young people are simply too new and inexperienced at both

if they cannot drink legally in their home State, they are involved in accidents driving home from a neighboring State with a lower drinking age.¹³ In addition, the legislators expressed concern for the broad problem of drunk driving¹⁴; many noted that the greatest part of the problem was caused by drivers over twenty-one years old.¹⁵

driving and drinking to do both.") (remarks of Rep. Anderson); H5399 ("[T]he combination of learning to drive, youthful risk-taking behavior and drinking accounts for the No. 1 killer of teenagers in our country today.") (remarks of Rep. Hutto). A number of legislators commented on the disproportionate number of accidents among those aged 18 to 21. *E.g.*, S8214 (remarks of Sen. Spector); S8228-29 (remarks of Sen. Mitchell); S8236 (remarks of Sen. Danforth); S8238-39 (remarks of Sen. Bradley); S8239 (remarks of Sen. Bumpers); S8241 (remarks of Sen. Glenn); S8243 (remarks of Sen. Mattingly); see also H5401 (remarks of Rep. Goodling); H5406 (remarks of Rep. Gilman).

¹³ *E.g.*, S8209 (remarks of Sen. Lautenberg); S8219 (remarks of Sen. Danforth); S8228 (remarks of Sen. Mitchell); S8237 (remarks of Sen. Boren); S8239 (remarks of Sens. Bradley and Biden); S8241 (remarks of Sens. Huddleston and Hollings). See also H5395 (remarks of Rep. Anderson); H5396 (remarks of Rep. Howard); H5402 (remarks of Reps. Porter and Coats). The highways near the border between States with different drinking ages are sometimes called "blood borders" or "blood corridors."

¹⁴ *E.g.*, S8225 ("Over 50,000 Americans are killed on the highways every year, and alcohol is involved in more than half of these deaths.") (remarks of Sen. Mathias); S8230 ("[T]he goal of our efforts to reduce drunk driving must be to reduce drunk driving across the board.") (remarks of Sen. Weicker); see also H5400 (remarks of Rep. DeWine); H5401 (remarks of Rep. Bennett); H5401-02 (remarks of Rep. Parris); and H5404-05 (remarks of Rep. McCollum), concerning drunk driving and alcohol abuse generally.

¹⁵ A number of legislators pointed out that 84% of the accidents are caused by drivers over age 21. *E.g.*, S8216 (remarks of Sen. Humphrey). Some noted that the specific problem ages are not 18 to 21. *E.g.*, S8219 ("Certainly, statistically, if you use that one set of statistics, then the mandatory drinking age ought to be raised at least to 30.") (remarks of Sen. McClure); *id.* (noting that "most of the studies point out that the drivers of age 21 to 24 are the worst offenders" and that one study found that more offenders were 37 years old than any other age) (remarks of Sen. Symms);

What uniformly appears in the Senate's consideration of the amendment is the perception and the intent that the effect of withholding federal funds would be to compel the States to conform to a minimum drinking age of twenty-one.¹⁶ For her part, the Secretary of Transportation stated her preference for withholding federal funds for noncompliance, rather than providing incentive grants for compliance, precisely because "the prospect of withholding otherwise available Federal-aid funds on which a state has based its highway program plans is more likely to lead to state action than is the prospect of forgoing additional funds which have not been part of its

S8231 ("So if logic, irrefutable logic, is to control our actions here today, we would exempt the 18, 19, and 20-year-olds from this restriction and attach it only to those who are 21, 22, 23, and 24.") (remarks of Sen. McClure). See also H5404 ("[W]e would certainly save a lot more lives if we increased the drinking age to 25, or 28, or 30. . . . [T]he highest No. 1 age group is the age 37. The second is the age 26, and the third is the age 30.") (remarks of Rep. McCollum).

¹⁶ Senator Lautenberg, one of the prime sponsors of the amendment, favored it because it "turns from the carrot to the stick, a modest, but effective, stick" (S8209). He specifically rejected the use of incentive grants with the rhetorical statement: "What is the most effective way to achieve a uniform minimum drinking age of 21 across the country, the carrot or the stick?" (S8216). Others used the same common metaphor (or either half of it) to contrast incentive grants and withholding funds. *E.g.*, Sen. Mathias (S8225); Sen. Mattingly (S8243-44); and Sen. Percy (S8244). Senator Symms, co-sponsor of a substitute amendment that would have provided incentive grants, called the NMDA an "offensive big stick approach" (S8223). Other Senators variously described the amendment as "blackmail" (Sen. Baucus, at S8213; Sen. McClure, at S8232; Sen. Thurmond, at S8246); as "coercion" (Sen. Pressler, at S8234; Sen. Humphrey, *ibid.*, and at S8235; Sen. Thurmond, at S8246); and as punishing (Sen. Boren, at S8237) or penalizing (Sen. Levin, at S8245) the States. Senator Chafee stated that the amendment was "an opportunity to send a stronger signal [than incentive grants] to compel the States to adopt this measure" (S8243).

planning process.”¹⁷ What is uniformly absent from the legislative history is any concern for how the spending condition was necessary and proper to effectuate the intent of Congress in making the grant of highway construction funds to which the condition was attached.

SUMMARY OF ARGUMENT

I. Congress may spend for “the general Welfare,” independent of its specific delegated regulatory powers. In exercising its spending power, Congress may also establish conditions relating to its expenditure of funds; but to be valid as conditions, the requirements or prohibitions must relate directly to the grant itself. The court of appeals erred in determining that the NMDA was a valid spending condition imposed by Congress.

The court of appeals improperly concluded that the NMDA did not constitute “coercion” of the States. The Court ignored both the legislative history, which plainly demonstrates that the NMDA is a coercive measure, and the practical dependence of the States on federal highway funds. In any event, the “coercion/inducement” test is not helpful in determining whether a requirement attached to a grant is valid as a condition under the Spending Clause, or is a regulatory enactment that must be supported by the powers specifically delegated to Congress. The coercion/inducement test stems from *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), whose holding, upon close analysis, fails to support it. Since *Steward*, the Court has recognized on numerous occasions that there is no constitutionally significant difference between coercing action by withholding a benefit and inducing action by granting a benefit. Either may operate as a coercive measure destructive of fundamental rights.

A more pertinent inquiry is whether the condition relates directly to the purpose of the expenditure to which it is attached, or is, rather, legislation directed to an-

¹⁷ Letter of June 19, 1984, from Secretary Elizabeth Hanford Dole to Senator Frank Lautenberg, reprinted at 130 Cong. Rec. S8209 (daily ed. June 26, 1984).

other, distinct federal purpose. In the latter case, the condition cannot be a valid exercise of the *spending power*, although it may be valid pursuant to one of Congress’ expressly delegated regulatory powers.

The NMDA bears no direct relationship to the grant of federal funds for the construction and improvement of highways. The amendment does not specify the purpose for which the funds may be spent, does not relate to the highways which are the object of the expenditure, and does not even relate to users of the highway. Instead, its effect is to legislate in an extraneous area by limiting the States’ discretion to control the sale and distribution of alcoholic beverages within their borders. That is the effect that Congress intended, as appears clearly from the legislative history. Under these circumstances, the NMDA is not a valid exercise of the *spending power*; and it must be examined to determine whether it is within the scope of Congress’ delegated regulatory powers.

II. Congress has no power under the Constitution to enact a national minimum drinking age. The State’s right to “regulate the sale or use of liquor within its borders” lies within the “core § 2 powers” vested in the States by the Twenty-first Amendment. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984). That Amendment “directly qualifies the federal commerce power” (*324 Liquor Corp. v. Duffy*, No. 84-2022, slip op. 10 (U.S. January 13, 1987)), the only possible source of authority for regulation by Congress of the local sale and consumption of alcoholic beverages. There is no place for a “balancing” test in the area of “the State’s central power under the Twenty-first Amendment” to “regulat[e] the times, places, and manner under which liquor may be imported and sold” (*Capital Cities Cable*, 467 U.S. at 716). The history of the Twenty-first Amendment, particularly the elimination of proposed § 3 because it would have given Congress effective control over local liquor sales, demonstrates beyond doubt that Congress has no power to impose a national minimum drinking age.

Even if the Twenty-first Amendment did not preclude enactment of a national minimum drinking age, Congress has no power to compel the States to adopt laws to achieve that objective. This Court has never "sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations" (*FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982)), but rather has expressed doubt on this point (*id.* at 762 n.26). The constitutional division of powers between the national government and the States precludes Congress from mandating state legislation.

Accordingly, the National Minimum Drinking Age Amendment cannot be sustained, either as an exercise of Congress' broad spending power or under the regulatory powers delegated to it by the Constitution.

ARGUMENT

I. CONGRESS' POWER TO SPEND FOR THE GENERAL WELFARE DOES NOT AUTHORIZE IT TO REGULATE THROUGH CONDITIONS UNRELATED TO THE EXPENDITURE OF FEDERAL FUNDS.

It is beyond doubt that Congress may spend money for the general welfare independent of its enumerated regulatory powers. In *United States v. Butler*, 297 U.S. 1, 66 (1936), the Court broadly held that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."

It is similarly clear that, as an incident of the spending power, Congress may attach reasonable conditions to the grant of federal funds to ensure that the funds are expended for such purposes and in such manner as intended by Congress.¹⁸ The varied nature of the spend-

¹⁸ See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (opinion of Burger, C.J.) (requirement that 10% of the federal funds granted for local public works projects be allocated to minority business enterprises); *Harris v. McRae*, 448 U.S. 297 (1980) (prohibition on using federal funds to reimburse the costs of abortions under the Medicaid program); *Lau v. Nichols*, 414 U.S. 563 (1974) (re-

ing conditions involved in just the Court's decided cases (see n.18, *supra*) discloses a congressional spending power of extremely broad dimensions.¹⁹ Nevertheless, the spending conditions that the Court has upheld were directly related to the purposes of the particular grants to which they were attached. In this way, notwithstanding the range of their subject matter, these decisions preserve the limitations inherent in the Constitution's grant to Congress of only certain delegated powers.²⁰

quiring grantee of education funds to take affirmative steps to rectify the language deficiencies of school children who cannot participate in the educational program because of their inability to speak and understand English); *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 143 (1947) (prohibition on use of federal funds to finance the employment, for the administration of those funds, of any state or local employee who engages in political activity). See also *Steward Machine Co. v. Davis*, 301 U.S. 548, 593 (1937) ("What is basic and essential may be assured by suitable conditions.").

¹⁹ The *Federalism Report* (at 33) collects a number of other wide-ranging grant conditions (none of them tested in this Court). "Grants for highway construction, for example, have been used to require that States regulate billboard advertising, hide junkyards along the road, survey all their roads to identify and correct hazards, . . . and comply with the now infamous 55 mile-per-hour speed limit. Congress has dictated local land use by, for example, mandating community participation in national flood insurance programs and adoption of flood plain management guidelines before individuals in those communities may borrow funds from federally supervised lending institutions. Similarly, Congress has intervened in state labor relations by requiring local governments to continue collective bargaining agreements with their employees or face denial of money for mass transit. . . . The list of such statutes is limited only by Congress' ingenuity." (Footnotes omitted.) In addition, States are ineligible for sewage treatment grants unless they are in compliance with federal clean air and motor vehicle emissions programs; grants for inspection of vehicle emission devices are tied to the existence of a highway safety program; and grants for that program are themselves tied to providing sidewalk curbs that are accessible to the handicapped. See *id.* at 79 n.125.

²⁰ The Court has recently noted, without elaboration, that "[t]here are limits on the power of Congress to impose conditions on the States pursuant to its spending power." *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 n.13 (1981).

Given this necessary limitation, it is plain that the court of appeals erred in its analysis of the NMDA by failing to require that it bear a direct relationship not merely to some general national interest but to the purpose of the grant itself. The court erred in a second significant respect, by suggesting that the question whether the NMDA amounted to coercion, or could be termed inducement, was relevant to its validity. We discuss the second error first.

A. The Validity Of Grant Conditions Should Not Be Determined By An Inquiry Focusing On The Distinction Between Coercion And Inducement.

The court of appeals held that the NMDA was a valid "inducement," rather than invalid coercion, reasoning that, "to the extent a state finds the conditions attached by Congress distasteful, the state has available to it the simple expedient of refusing to yield to what it urges is 'federal coercion.'" Pet. App. A21. Both parties repeat the error of suggesting that the test for the validity of the NMDA should be whether it amounts to impermissible "coercion" or permissible "inducement."²¹

If this test is applied in this case, the NMDA must fail. If the test has any meaning at all, coercion must be found on this record. The prime sponsor of the amendment proposed it precisely because it was coercive. Using the most common metaphor for the difference between coercion and inducement, Senator Lautenberg favored withholding funds, rather than incentive grants, because it "turns from the carrot to the stick" (S8209), and the "stick" was going to be "the most effective way to achieve a uniform minimum drinking age" (S8216). Both supporters and opponents of the NMDA characterized it as coercive (see n.16, *supra*); and the Administration supported it, in preference to incentive grants, solely because of its coercive effect (see pp. 9-10, *supra*). The court of appeals' suggestion that States may

²¹ See, e.g., Pet. 21, 24; Op. Cert. 6 n.2, 11-12. See also Brief of the States (7-9) and Brief of the National Beer Wholesalers' Assn. (18-19) in support of the petition for certiorari.

avoid coercion by declining the grant ignores not only this legislative history, but also the "ability of industry and individuals to move among jurisdictions in order to escape high local taxes" and the "citizens' demand for a high level of state and local services, [which] rende[r] States highly dependent on federal grants."²²

On a more fundamental level, however, we submit that the coercion/inducement test should not be applied, in this or any other spending condition case.²³ The distinction is unhelpful in resolving cases of this sort because it does not address the question whether a grant condition is a valid restriction on the grant of federal funds pursuant to the spending power, or a regulation whose

²² Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1254 (1977). Others have noted this dependence (e.g., *Federalism Report* 36); in this case, some Members of Congress and the Administration sought to exploit it. See nn.16-17 and accompanying text, *supra*. The sponsor of the highway appropriations bill in the House stated that they were necessary to fulfill a promise made when the gasoline tax was imposed to create the Highway Trust Fund. Representative Howard recounted the promise that if the Members "take tax money from their people, that money would be immediately available We promised that we would not collect the tax money and then just hold it here in Washington, D.C. . . . [The appropriation would] keep our promise . . . to the States which have such great needs . . ." (H5375). See also Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 882 (1979) ("If this aid proves temporary, its withdrawal creates added pressures on subnational governments that have accommodated their own service plans to the new source of revenue."); Comment, *The Federal Conditional Spending Power: A Search For Limits*, 70 Nw. U.L. Rev. 293, 303 & n.59 (1975) (noting that a court would have difficulty in weighing congressional dollars against the States' fiscal realities to determine coercion).

²³ The court of appeals' conclusion that there was no conflict between the NMDA and South Dakota's law rests on its view of the coercion/inducement test: there is no conflict because the State is free to reject the "inducement" of federal aid and keep its law. That conclusion is inextricably linked with the court's view that the NMDA is an exercise of the spending power, and it cannot be sustained when the NMDA is recognized to be, instead, congressional regulation. See Part II.A, *infra*.

constitutionality must be supported by a regulatory power specifically delegated to Congress.²⁴

The coercion test appears to derive from *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), which not only questioned the relevance of the concept of coercion in the context of the Tenth Amendment, but also left open the limits of that concept.²⁵ More important, a similar inquiry has been discarded as meaningless in other areas of constitutional adjudication; no more reason appears why it should have any significance here.

In *Steward*, the Court upheld the Social Security tax in the face of an attack based on provisions that permitted credit for up to ninety percent of the federal tax for contributions to an unemployment fund under a state law that had been approved by the federal government. The Court upheld the tax, finding that "[n]othing in the case suggests the exertion of a power akin to undue influence," even while questioning whether "such a concept can ever be applied with fitness to the relations between state and nation" (*id.* at 590). The carefully limited holding was only that, in that case, "if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line." *Id.* at 591 (emphasis added). The Court suggested where that line might be drawn when it reserved judgment on "a statute unrelated in subject-matter to activities fairly within the scope of national policy and power." *Id.* at 590 (emphasis added). In short, *Steward* furnishes no solid support for the coercion test.²⁶

²⁴ Professor Stewart terms the debate whether conditions on federal grants "coerce" the States "an unhelpful anthropomorphism." Stewart, *supra* note 22, at 1254.

²⁵ More recently, the Court has noted that "in a Tenth Amendment challenge to congressional activity, 'the determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States.'" *FERC v. Mississippi*, 456 U.S. 742, 770 n.33 (1982), citing *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 292 n.33 (1981).

²⁶ *Steward's* relevance is doubtful for at least two additional reasons. First, the Court expressly noted that the State itself did not object but, rather, appeared satisfied by her choice (301 U.S.

Steward, in any event, neatly foretold the difficulties inherent in determining "the location of the point at which pressure turns into compulsion, and ceases to be inducement." 301 U.S. at 590. Repeatedly, the Court has been forced to discard the distinction between coercion and inducement in the evaluation of conditions attached to governmental programs because of its recognition that there is no constitutionally significant difference between coercing action by withholding a benefit and inducing action by granting a benefit. Thus, in *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), the Court held that Sherbert's exclusion from unemployment benefits when she refused to work on Saturdays, contrary to her religion, was unconstitutional because "[g]overnmental imposition of such a choice [between adhering to religious beliefs and obtaining state benefits] puts the same kind of burden upon the free exercise of religion as would a fine imposed" for Saturday worship.

In numerous other contexts, the Court has noted the illusory nature of the difference between a penalty and the withholding of a benefit.²⁷ The Court's cases demon-

at 589-90), plainly negating any suggestion of coercion. But that result, far from supporting the coercion/inducement test, instead makes clear that the test is inappropriate. The validity of a federal law should not turn on the vagaries of the policy choices and the financial circumstances of one or more of the 50 States. Second, the constitutionality of the Social Security tax, including the credit system available as a matter of federal law to employers who paid a state tax, has no obvious bearing on the validity of a spending condition attached to a federal grant.

²⁷ See, e.g., *Attorney General of New York v. Soto-Lopez*, 106 S.Ct. 2317, 2325 (1986), striking down veterans' preference for civil service employment limited to persons resident in New York when they entered military service as "effectively penaliz[ing] otherwise qualified resident veterans who do not meet the prior residence requirement for their exercise of the right to migrate"; *Zobel v. Williams*, 457 U.S. 55, 59 (1982), invalidating preference, in distribution of benefits by Alaska, for persons who were residents when it became a State in 1959; *Thomas v. Review Board*, 450 U.S. 707 (1981) (following *Sherbert*); *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976), invalidating practice of terminating public employees based on their

strate that the determination whether a certain measure amounts to coercion, and not merely inducement, depends on a separate determination of the character of the interest affected, that is, whether the benefit withheld affects something that the law protects as a "right." See *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) ("the power of the State [to impose conditions] is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights").²⁸ This determination is difficult enough in the context of individual rights; in the context of the rights reserved to the States by the Constitution, it becomes virtually impossible.²⁹

B. The Validity Of "Conditions" On A Grant Depends Upon Whether They Are Specifications As To The Use Of The Grant Or An Attempted Regulation.

Rather than the illusory inquiry whether a condition on spending is coercive, the proper inquiry is whether

political affiliation because it "had the effect of imposing an unconstitutional condition on the receipt of a public benefit" (*Branti*, 445 U.S. at 514, citing *Perry v. Sindermann*, 408 U.S. 593 (1972)); *Wooley v. Maynard*, 430 U.S. 705 (1977), holding that the privilege of driving could not be conditioned on displaying the State's motto on the license plate; *Speiser v. Randall*, 357 U.S. 513, 518 (1958), striking down loyalty oath requirement imposed by California as a condition of a tax exemption, because "[i]ts deterrent effect is the same as if the State were to fine them for this speech"; *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946), holding that freedom of speech may not be limited by withdrawal of second-class mailing privilege; *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926), noting the "palpable incongruity [in] striking down an act of state legislation which by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but [upholding] an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold".

²⁸ See Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293, 1391-93 (1984).

²⁹ For example, in the context of the powers reserved to the States by the Tenth Amendment, compare *Maryland v. Wirtz*, 392

the requirement imposed by Congress is a condition at all, or whether it is in fact a regulation. *Butler* may have approved the "expenditure of public moneys for public purposes" (297 U.S. at 66), without regard to limitations implicit in the direct grants of legislative power, but it did not approve conditions on the expenditure of public moneys that serve regulatory purposes unrelated to the object of the expenditure. Thus, not every spending condition related to the national interest is valid as a lawful exercise of the spending power. The condition must relate to the purpose of the expenditure, not to some other national purpose that serves the "general Welfare." Otherwise, it is not a spending condition at all. It is simply regulation, and, as such, valid only if supportable as an exercise of a delegated power other than the spending power.

An example illustrates this point. Suppose that Congress, in the interest of the "general Welfare" in enhanced science education, determines to provide grants to the States to build schools. Congress may attach to those grants the requirement that those schools contain science laboratories. Congress may not, however, require that all other state schools have science laboratories because that requirement does not relate to the proper expenditure of the federal funds. It does relate to the national interest in science education; but because it does not relate to the purpose of the grant, it is regulation, not an exercise of the spending power. It may be valid as regulation, or it may not be; but it is not a lawful exercise of power under the Spending Clause. Although Congress has the power to *spend* for the general welfare, it has the power to *legislate* only for delegated purposes. The distinction is crucial if any semblance of a federal government of limited powers is to be preserved.

The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or

U.S. 183 (1968), with *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.³⁰

The will of the people as embodied in the Constitution grants to Congress only specific delegated powers. All powers not so delegated are expressly reserved to the States and to their people. Federal regulation, even though disguised as a spending condition, that exceeds Congress' delegated regulatory powers, threatens "the separate and independent existence" of the States. *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869).³¹

All of this is not to say that the Court must invalidate a purported condition on a grant that is found to be a regulation. As a regulation, the condition would be valid if it fell within one of Congress' delegated regulatory powers.³² A test that inquires whether the federal requirement is a condition at all, i.e., a specification as to the use of grant funds, rather than a regulation, need not call into question any decision of this Court.³³ It

³⁰ Cf. *Steward Machine Co.*, 301 U.S. at 590 ("We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power.").

³¹ See *Kaden*, *supra* note 22, at 881.

³² It is well settled that legislation invalidly enacted under one of Congress' powers will be upheld if valid under another. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 132, 144 (1948); *United States v. Butler*, 297 U.S. at 61.

³³ Thus, in the earliest spending condition cases, *Butler* and *Steward*, the "condition" could have been sustained as regulation under the Commerce Clause. Much of the confusion in the early spending and taxing cases no doubt resulted from what is now seen as an overly narrow view of the commerce power. Compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918), with *United States v.*

will merely ensure that the decision in this case and others in the future will reflect the constitutionally imposed limits on Congress' authority.

C. The National Minimum Drinking Age Amendment Is Not A Condition On The Expenditure Of Federal Funds, But An Attempted Regulation.

At issue in this case is the requirement that States enact a minimum drinking age as a condition on the grant of highway funds. Its validity thus depends on whether the adoption of a minimum drinking age is a necessary and proper condition to effectuate Congress' purpose in providing funds to the States for highway construction, not to effectuate some other national purpose, no matter how laudable.

There is no dispute that Congress, pursuant to its spending power, may grant funds to the States to build and maintain highways. Nor is there any dispute that Congress may impose specifications necessary to effectuate its intent in spending for those highways, by dictating, for example, that the highway shall be built in a certain location,³⁴ or according to a certain construction design,³⁵ or that it shall have special lanes designated for use by high occupancy vehicles,³⁶ or shall not be used by vehicles over a certain weight.³⁷ Such conditions, which relate either to the construction of the highway or to its use, may be necessary to accomplish the purpose of the grant itself. They are lawful specifications on the use of the federal funds provided; and they are valid for the same reason that Congress may spend money for

Darby, 312 U.S. 100 (1941). Thus, we do not urge, as the Solicitor General characterizes petitioner's argument (Op. Cert. 10), that "any condition attached to a legislative grant of funds would be unconstitutional unless it were independently supported by some clause of the Constitution other than the Spending Clause." We argue simply that requirements that are *not* "spending" conditions must be independently supported.

³⁴ See, e.g., 23 U.S.C. § 148.

³⁵ See, e.g., 23 U.S.C. § 109.

³⁶ See 23 U.S.C. § 142.

³⁷ See 23 U.S.C. § 127.

health care and specify that none of that money may be spent on abortions (*see Harris v. McRae*, 448 U.S. 297 (1980)), or spend money on local public works projects and specify that a percentage of the funds must be allocated to minority contractors (*see Fullilove v. Klutznick*, 448 U.S. 448 (1980)). As the purchaser of a highway, Congress is entitled to specify, just like any other purchaser, precisely the kind of highway that it wants.³⁸ What Congress may not do pursuant to its spending power is to impose requirements on a grant that go beyond specifying how the money should be spent. Those requirements are not conditions at all; they are regulation. In the name of the general welfare, Congress may spend for anything that it wishes; but it cannot buy compliance with unrelated legislation that is not otherwise within its delegated regulatory powers.

That, however, is precisely what Congress attempted to do when it added the NMDA to the Surface Transportation Assistance Act. The purpose of Title I of that Act was to provide funds to complete, and to resurface, restore, rehabilitate, and reconstruct the Interstate System, and to fund system-related projects. See H.R. Rep. No. 555, 97th Cong., 2d Sess. 2-3 (1982), *reprinted in* 4 U.S. Code Cong. & Ad. News 3639, 3640-41 (1982). The purpose of the NMDA, as identified by the court below and set out clearly in the legislative history, was to prevent teenage highway deaths attributable to drunk driving, particularly when teenagers drive across state lines to drink. Preventing teenage highway deaths is obviously an important goal; South Dakota and other States are themselves pursuing it by various means (*see n.11, supra*). A national minimum drinking age of twenty-one may aid in effectuating this goal. But a national minimum drinking age is not related to Congress' intent in expending funds for the construction and maintenance of national highways.

³⁸ We leave aside here any limitations that might be imposed on the specifications by other constitutional provisions.

The NMDA does not specify anything concerning the nature of the highways for which Congress wishes to spend federal funds.³⁹ Instead, the amendment uses the States' need for federal highway dollars to accomplish an unrelated regulatory purpose. The court below upheld the amendment on the ground that it furthered an important national purpose, the elimination of drunk driving by young adults. On that theory, the condition would have been equally related to any other federal expenditure, such as the hypothetical grant of funds to the States for science education.

Moreover, unlike true spending conditions, which merely specify the permissible uses of federal funds, the congressional purpose of establishing a uniform minimum drinking age cannot be accomplished unless all the States take the grants and comply with the condition. The decision by even a single State to forgo the federal funds in order to avoid compliance would thwart the regulatory end. The dependence on uniformity is the hallmark of

³⁹ It cannot reasonably be argued that Congress wished to spend its funds on a "safe" highway, defined to be a highway free of drunk drivers. The NMDA was attached not to the grant of safety funds, but to general highway construction funds. See, *e.g.*, S8206 (remarks of Sen. Danforth); see also H5395 (remarks of Rep. Howard); H5398 (remarks of Rep. Florio). Moreover, the condition was imposed after the grants for the highways were made and the States took advantage of the unrestricted federal aid to build highways, the use of which Congress now seeks to control. The condition is also at once so overbroad and underinclusive that it plainly does not accomplish even the goal of safe highways. The NMDA requires the States to prohibit the purchase of alcohol by all persons younger than 21, whether or not they ever drive; and it does nothing about the drivers older than 21, who account for 84% of the accidents (*see n.15, supra*). It is apparent that the goal of uniformity, in which Senator Danforth, a sponsor of the bill, stated that Congress was "more interested than the precise age" (S8219), would have been served as well by requiring all States to lower the drinking age to 18, while the problem of youthful drivers would have been better served by raising the driving age.

regulation, not grant conditions.⁴⁰ The court of appeals held that withholding highway funds pending the adoption of a minimum drinking age is "reasonably related to Congress's interest in achieving a nationally uniform minimum drinking age." Pet. App. A13. This tautology, however, has no bearing on the issue whether the condition is reasonably related to the grant to which it is attached. The court of appeals' syllogism—that Congress could have concluded that drinking and driving by young adults was a problem of national proportions; that a uniform minimum drinking age would lessen that problem; and that the grant condition was therefore reasonably related to solution of the national problem—is a fine description of support for the exercise of the regulatory power. It has nothing to do with the exercise of the spending power.

The error of the court of appeals' analysis is patent. If the courts uphold grant conditions that are not specifications for the grant itself, but are simply, in some way, "in the general welfare," Congress assumes license to regulate for the general welfare, i.e., without regard to the limitations inherent in the grant of specific delegated regulatory powers. As we discuss below, the NMDA is not within those powers.

II. THE NMDA IS NOT SUSTAINABLE AS AN EXERCISE OF ONE OF CONGRESS' DELEGATED REGULATORY POWERS.

A. Congress Has No Power To Enact A Minimum Drinking Age Pursuant To The Commerce Clause Because It Is Limited By The Twenty-first Amendment.

The Solicitor General urges that the NMDA is valid under the Spending Clause because the Twenty-first

⁴⁰ Ironically, in the absence of uniformity, a State that does comply might suffer *increased* teenage deaths due to drunk driving. If two adjacent States set the drinking age below 21, and one raises the drinking age because it cannot afford to forgo the federal highway funds, it might for the first time see its youths create "blood borders" by drinking in the adjacent State, whereas it previously kept them close to home.

Amendment operates as a limitation only on Congress' power under the Commerce Clause, and not on its spending power. Op. cert. 4, 6, 8. As we have demonstrated in Part I, however, the NMDA is not a valid exercise of the spending power because it is not a condition related to the expenditure of federal funds, but a regulation unrelated to spending.⁴¹ Hence, the NMDA can be sustained only if the regulatory powers expressly delegated to Congress comprise the authority to establish a national minimum drinking age.

It is apparent that the only delegated power that could conceivably support such a regulation would be the Commerce Clause.⁴² The Solicitor General concedes, as he must, that "the principal purpose of the Twenty-first Amendment was to limit the operation of the Commerce Clause with respect to state regulation of the liquor industry." Op. cert. 7. That much is clear from this Court's decisions. The Court has only recently reiterated that "[s]ection 2 [of the Twenty-first Amendment] 'grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system,'" and, conversely, that § 2 "directly qualifies the federal commerce power." 324 *Liquor Corp. v. Duffy*, No. 84-2022, slip op. 10 (U.S. January 13, 1987), citing *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Although the State's power may be "circumscribed by other provisions of the Constitu-

⁴¹ The Solicitor General argues in the alternative that even if the Spending Clause were limited by the Twenty-first Amendment, the NMDA would be valid because there is no conflict between state law and the NMDA (Op. cert. 10-12), or because any such conflict must be resolved in favor of federal law (*id.* at 13-14). Because, as we have shown, the NMDA is not an exercise of the spending power, there is a conflict. We demonstrate below that state law must prevail in that conflict.

⁴² *Amici* concede only *arguendo* that, apart from the Twenty-first Amendment, the Commerce Clause would authorize preemption of state police power in the regulation of the local sale and consumption of alcoholic beverages.

tion" (*ibid.*; emphasis added), when the limitation is asserted under federal legislation, or even under the Commerce Clause itself, "[t]he question in each case is 'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'" *Id.* at 11, citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).⁴³

Thus, the Court has recognized that the State's powers to "regulate the sale or use of liquor within its borders" are "the core § 2 powers." *Capital Cities Cable*, 467 U.S. at 713. Within this core area, the State's power is absolute. Whatever regulation the federal government may impose on interstate traffic in intoxicating beverages,⁴⁴ it can assert no power in this core area. To allow any balancing of federal and state interests with regard to "the sale or use of liquor" within the State would eviscerate the States' Twenty-first Amendment powers. If Congress may forbid the sale of liquor to persons under age twenty-one, it may, with equal logic, set the minimum age at thirty-seven, the age that one study found most drunk drivers to be (see n.15, *supra*), or even 121, which would be safer still. Such an expansion of Congress' powers under the Commerce Clause would enable it to reintroduce Prohibition without a constitutional amendment. A minimum drinking age is

⁴³ Cases such as *Craig v. Boren*, 429 U.S. 190 (1976), and the other constitutional cases cited by the Court in *324 Liquor* (slip op. 10), and by the Solicitor General (Op. Cert. 7-8), invalidating state regulatory measures enacted under the Twenty-first Amendment, stand only for the proposition that the state power under the Twenty-first Amendment is constrained by constitutional provisions other than the Commerce Clause. These decisions are not pertinent to this case, which concerns a challenge to a federal statute, not a state statute.

⁴⁴ *E.g.*, *United States v. Frankfort Distillers, Inc.*, 324 U.S. 293 (1945), *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939).

nothing but Prohibition, a Prohibition limited by age, to be sure, but Prohibition nevertheless.

Within the States' core powers, this Court has never held that balancing of state and federal interests is appropriate. Only outside of the core area has the Court held that the Twenty-first Amendment does not deprive Congress of all authority, nor shield the States of all responsibility, under the Commerce Clause. It may not always be easy to tell what lies within the core powers and what does not,⁴⁵ but they must certainly include any state regulation regarding the legality of the local sale or use of liquor within the State, and must necessarily prevent any federal regulation that would allow Congress to override that ultimate decision.⁴⁶ "[T]he State's central power under the Twenty-first Amendment" is "regulating the times, places, and manner under which liquor may be imported and sold." *Capital Cities Cable*, 467 U.S. at 716.

Similarly, whatever lurking doubts might remain concerning the precise scope of § 2 (see *324 Liquor*, slip op. 10 n.10; *Bacchus*, 468 U.S. at 276), it is clear that it

⁴⁵ Compare, *e.g.*, *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 63 (1936) ("Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost . . .") with *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) ("The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition.").

⁴⁶ Thus in *Midcal* and *324 Liquor*, the Court upheld the application of federal antitrust laws to resale price maintenance laws for wine and liquor; in *Bacchus*, the Court invalidated a tax exemption for local distillers under the Commerce Clause; and in *Capital Cities Cable*, the Court held that federal cable television regulation preempted a state ban on liquor advertising. These cases thus do not detract from the proposition that the State's core powers are absolutely protected from federal regulation under the Commerce Clause; they hold only that assertions of authority not within the core powers are not absolutely protected from federal statutory preemption or invalidation under the Commerce Clause itself.

includes the power to set the age of the purchasers of alcoholic beverages. As originally proposed, the Twenty-first Amendment contained a third section that would have given Congress "concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138 (1933). Senator Wagner successfully urged that this proposal must be deleted because, among other reasons, Congress might then attempt to regulate even the "age of the purchasers." *Id.* at 4147. Senator Wagner prevailed because of the obvious logic of his argument that this power would have "expelled the system of national control through the front door . . . and readmitted it forthwith through the back door" (*ibid.*).

In this core area, then, as repeatedly defined by the Court, the State's authority is exclusive as a matter of constitutional law.⁴⁷ That is the meaning, the function, and the effect of core powers.

B. Congress Has No Power To Compel The States To Enact Legislation.

Even if Congress had the power to enact a minimum drinking age, Congress has no power to require state legislatures to do so. See, e.g., *FERC v. Mississippi*, 456 U.S. 742, 761-62, 762 n.26 (1982); *EPA v. Brown*, 431 U.S. 99 (1977).⁴⁸

In *FERC v. Mississippi*, the Court expressly noted that it had "never . . . sanctioned explicitly a federal

⁴⁷ As the State points out in its brief, constitutional law in this respect is also sound policy because different local conditions may dictate different local solutions to the problems posed by drunk driving and by teenage drinking. See also n.11, *supra*.

⁴⁸ See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819) (emphasis added) ("No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends."). Cf. *INS v. Chadha*, 462 U.S. 919 (1983) (Congress cannot authorize another body to exercise legislative judgment).

command to the States to promulgate and enforce laws and regulations" (456 U.S. at 761-62). In that case, the Court rejected Tenth Amendment challenges to Titles I and III of the Public Utility Regulatory Policies Act, which directed the States to consider specified ratemaking standards and imposed certain procedures on state commissions. The Court upheld these Titles on the ground that they required only *consideration* of the federal standards and that such consideration was less intrusive than preemption of the field of utilities regulation, which would have been within Congress' power. *Id.* at 764-65. The Court referred to the doubt expressed in *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 695 (1979), "as to whether a state agency 'may be ordered actually to promulgate regulations having effect as a matter of state law.'" 456 U.S. at 762 n.26. In *FERC*, however, the Court concluded that, "because the two challenged Titles simply condition continued state involvement in a preemptible area on the *consideration* of federal proposals, they do not . . . threaten the States' 'separate and independent existence'" *Id.* at 765 (emphasis added; citations omitted). They were valid because they did not involve "the compelled exercise of [the State's] sovereign powers." *Id.* at 769.⁴⁹

Justice O'Connor, dissenting in part in *FERC*, disagreed with the majority's characterization of the effect of the challenged Titles and its Tenth Amendment analysis. She noted that "the power to choose subjects for legislation is a fundamental attribute of legislative power, and interference with this power unavoidably

⁴⁹ The *FERC* majority did not look to *National League of Cities* as the only source of the perceived limitations on Congress' authority. Those limitations were also traced to *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911), which was expressly preserved in *Garcia v. San Antonio Metro. Transit Auth.* (469 U.S. at 556), as well as to *Fry v. United States*, 421 U.S. 542 (1975), and *Lane County v. Oregon*, which *Garcia* did not overrule. Thus, the constitutional doubt expressed in *FERC* survives *Garcia*, which did not even discuss the *FERC* case in overruling *National League of Cities*.

undermines state sovereignty" (*id.* at 785), and reasoned that "[i]f Congress routinely required the state legislatures to debate bills drafted by congressional committees, it could hardly be questioned that the practice would affect an attribute of state sovereignty." *Id.* at 780. See also *id.* at 794-95 (describing rejection at the Constitutional Convention of a proposal for a congressional negative of state laws.).

Both the majority and dissenting opinions in *FERC* correctly appreciate the constitutional impediment to congressionally mandated state legislation. No decision of this Court has ever gone so far as to recognize Congress' authority pursuant to its delegated regulatory powers to compel the States to enact legislation. The NMDA does not simply provide for state consideration of federal standards, or even a framework for state implementation of federal legislative goals by whatever means the States may choose. It compels state enactment of federal legislative goals, and it is therefore unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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January 22, 1987

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BRIEF

JAN 22 1987

JOSEPH F. SPANOL, JR.
CLERK

No. 86-260

In The
Supreme Court of the United States
October Term, 1986

THE STATE OF SOUTH DAKOTA,

Petitioner,

v.

THE HONORABLE ELIZABETH H. DOLE,
SECRETARY, UNITED STATES DEPARTMENT
OF TRANSPORTATION, IN HER
OFFICIAL CAPACITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES _____	ii
INTEREST OF AMICI CURIAE _____	2
SUMMARY OF ARGUMENT _____	2
ARGUMENT _____	3
I. IMPORTANT CONSTITUTIONAL RIGHTS AND GUARANTEES ARE VIOLATED BY THE NATIONAL MINIMUM DRINKING AGE	3
A. The National Minimum Drinking Age Con- travenes Basic Principles of Federalism ____	3
B. The National Minimum Drinking Age Coerces States to Surrender Their Sovereignty ____	5
CONCLUSION _____	8

TABLE OF AUTHORITIES

CASES:	Page
<i>California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980)	4
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 105 S. Ct. 1005 (1985)	3, 5
<i>Montgomery County v. Califano</i> , 499 F. Supp. 1230 (D. Md. 1978), <i>aff'd mem.</i> , 599 F.2d 1048 (4th Cir. 1979)	7
<i>Oklahoma v. Civil Service Commission</i> , 330 U.S. 127 (1947)	6
<i>Pennhurst State School and Hospital v. Halderman</i> , 451 U.S. 1, 17 n.13 (1981)	5
<i>Steward Machine Co. v. Davis</i> , 301 U.S. 548 (1937) ..	5, 6
<i>United States v. Butler</i> , 297 U.S. 1 (1936)	7
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	3
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	4

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. amend. X	<i>passim</i>
U.S. Const. amend. XXI	<i>passim</i>
23 U.S.C. § 158	3

OTHER AUTHORITIES:

Ripple & Kenton, <i>State Sovereignty—A Polished But Slippery Crown</i> , 54 Notre Dame Lawyer 745 (1979)	8
National Conference of State Legislators, <i>State Legislative Oversight of Federal Funds: Preliminary Report and Suggested Activities</i> (1979) ..	5

TABLE OF AUTHORITIES—Continued

	Page
Stewart, <i>Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy</i> , 86 Yale L.J. 1196 (1977)	6
<i>The Federal Conditional Spending Power: A Search for Limits</i> , 70 Nw. U.L. Rev. 293 (1975)	7

No. 86-260

**In The
Supreme Court of the United States**
October Term, 1986

THE STATE OF SOUTH DAKOTA,
Petitioner,
v.

THE HONORABLE ELIZABETH H. DOLE,
SECRETARY, UNITED STATES DEPARTMENT
OF TRANSPORTATION, IN HER
OFFICIAL CAPACITY,
Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**BRIEF AMICI CURIAE OF MOUNTAIN STATES
LEGAL FOUNDATION AND THE STATE OF
NEW MEXICO**

Mountain States Legal Foundation (MSLF or the Foundation) respectfully submits this brief amici curiae on behalf of its members and the State of New Mexico.¹

¹MSLF has filed the written consents of all parties with the Clerk of the Court.

INTEREST OF AMICI CURIAE

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to a free society as protected by the United States Constitution and the nation's legal traditions.

MSLF and the State of New Mexico are deeply concerned that the continuing erosion of the concept and practice of federalism will ultimately destroy the constitutional balance of power between the states and the national government. Although New Mexico has adopted a minimum drinking age of twenty-one years, the State is alarmed by the federal government's usurpation of its authority to regulate alcohol under the Tenth and Twenty-First Amendments to the United States Constitution.

This case provides an excellent vehicle for this Court to review the origins of federalism as embodied in the Constitution, and restore the ideal of state sovereignty to its proper place in our federal system.

SUMMARY OF ARGUMENT

Inherent in the United States Constitution is a federal form of government that establishes distinct lines of authority between the state and national governments. The National Minimum Drinking Age oversteps the proper role of the national government by directly interfering with the sovereign function of the states to regulate alcohol under the Tenth and Twenty-First Amendments.

ARGUMENT

I. IMPORTANT CONSTITUTIONAL RIGHTS AND GUARANTEES ARE VIOLATED BY THE NATIONAL MINIMUM DRINKING AGE.

The National Minimum Drinking Age, 23 U.S.C. § 158, unconstitutionally infringes on the rights of the several states and their citizens to be free from unwarranted federal regulation in an area explicitly reserved to the states by the Tenth and Twenty-First Amendments.

A. The National Minimum Drinking Age Contravenes Basic Principles of Federalism.

From the time the Tenth Amendment was introduced in the first session of Congress to quell states' fears about surrendering power to a central government, the courts have grappled with the delineation of state and national spheres of power. *See United States v. Darby*, 312 U.S. 100, 124 (1941). The present controversy calls upon this Court to make a major decision regarding the continued viability of the federal system in America and the future relationship of the state and federal governments.

As Justice O'Connor noted in her dissenting opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005, 1035 (1985) (O'Connor, J., dissenting):

[T]here is now a real risk that Congress will gradually erase the diffusion of power between state and nation on which the Framers based their faith in the efficiency and vitality of our Republic.

The basic belief underlying the American federal system is that "the National Government will fare best if the States and their institutions are left free to perform

their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). This concept is embodied in the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The power to regulate alcohol within a state's borders is a power that is *not* delegated to the federal government, and is thus reserved to the states under the Tenth Amendment. The ratification of the Twenty-First Amendment left no doubt that the regulation of alcohol is generally a matter of state, not federal, concern. *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) ("[t]he Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.").

The passage of the Twenty-First Amendment (and the repeal of the Eighteenth Amendment) is a clear acknowledgment that alcohol use is a matter of local concern that should be regulated by the states. Regulation of alcohol at the state level permits local government to adopt standards that best reflect community concerns. Local laws regarding alcohol can be tailored to the unique circumstances of an area and will more likely address citizens' needs and desires than would laws dictated by a uniform national policy.

B. The National Minimum Drinking Age Coerces States to Surrender Their Sovereignty.

Although the authority of Congress to regulate under the commerce and spending powers is broad, the Constitution places limits upon these powers when they are exercised in a manner that infringes upon state sovereignty. See *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005, 1029-30 (1985) (Powell, J., dissenting) ("our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of States as States by means of the Commerce Power") (quoting *National League of Cities v. Usery*, 426 U.S. 833, 842 (1976)); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 n.13 (1981) ("[t]here are limits on the power of Congress to impose conditions on the States pursuant to its spending power" (citations omitted)).

The last fifty years have seen an unprecedented growth of federal regulatory activity. The massive increases in federal grant programs to the states have generally taken the form of conditional funding, whereby the states must comply with a wide range of conditions or lose millions of dollars in federal funds.²

In *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), the Court discussed the constitutionality of various degrees of pressure brought to bear upon states by the national government through the exercise of its spending

²Today, fully one-quarter to one-third of an average state's budget is made up of federal funds. National Conference of State Legislators, *State Legislative Oversight of Federal Funds: Preliminary Report and Suggested Activities* 6-9 (1979).

power. The Court established a distinction which is applicable here, although *Steward Machine* presented a substantially different factual situation. The primary consideration in assessing the constitutionality of national government actions is whether those actions are "weapons of coercion, destroying or impairing the autonomy of the states." *Id.* at 586.

The Court further elucidated:

[T]he location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact.

Id. at 590. Thus, the relevant determination is whether the federal government's action has gone beyond the bounds of mere "inducement" and become "coercion." Amici urge that coercion analysis is an appropriate method for testing national governmental authority and that such coercion exists in the present case.

The often-reiterated reason for finding that conditions placed on funding are not coercive is that the state may simply choose not to participate in the offending program. *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947). However, that option becomes illusory when the conditions are attached to a wide variety of major federal funding programs. See Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1257 (1977). Given the drastic increase in the amount of federal funds going to states in recent years, it is unrealistic to base the validity of federal conditions on the state's nominal right not to participate in a program. In addition, a state's rejection of a particular fed-

eral program to avoid objectionable conditions denies its citizens the benefits of a program that is supported by their tax dollars. Therefore, no matter how onerous or intrusive the conditions, most states eventually comply rather than risk the loss of federal funding.

When the federal government threatens a state with economic crisis, its demands must surely be seen as coercive. Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 Nw. U.L. Rev. 293, 303 (1975). The states' overwhelming dependence on federal funds makes federal coercion a serious concern, because "economic pressure may threaten such havoc to a state's well being as to cause the federal legislation to cross the line which divides inducement from coercion. . . ." *Montgomery County v. Califano*, 499 F. Supp. 1230, 1247 (D. Md. 1978), *aff'd mem.*, 599 F.2d 1048 (4th Cir. 1979).

In this case the risk of loss of funding is high. Any state failing to adopt a minimum drinking age of twenty-one by October 1, 1986, loses five percent of its fiscal year 1987 federal aid highway funds. In fiscal year 1988, ten percent of such funds would be withheld for failure to comply with the drinking age condition. Hence, a state has no realistic choice but to give in to the federal demands. The effect of this coercion on the western states is especially compelling due to their heavy reliance on the federal highway system and their limited taxpayer population. Such unrestricted power "to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power." *United States v. Butler*, 297 U.S. 1, 74 (1936).

If conditions placed on federal funding are confined to those necessary to carry out the express and limited purposes of the enactment or to ensure proper expenditure of federal funds, the danger of misuse of the national government's dominant position is not as great. But the condition attached to federal funding in this case does not in any way relate to the statute's stated purpose of accelerating construction of the federal aid highway system or to the administration of the funding program. The Congress instead used the offer of national government funds in one area "to force surrender of tenth amendment autonomy in another." Ripple & Kenton, *State Sovereignty—A Polished But Slippery Crown*, 54 Notre Dame Lawyer 745, 759 (1979). Hence, the National Minimum Drinking Age constitutes an unconstitutional intrusion into state sovereignty.

CONCLUSION

For the foregoing reasons, the Amici request that this Court restore the states to their proper place in our federalist system of government by reversing the decision of the Eighth Circuit Court of Appeals.

Dated this 22nd day of January, 1987.

Respectfully submitted,

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BRIEF

JAN 22 1987

JOSEPH F. SPANOL, JR.
CLERK

No. 86-260

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Supreme Court of the United States

October Term, 1986

STATE OF SOUTH DAKOTA,

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v.

THE HONORABLE ELIZABETH H. DOLE,
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Respondent.

BRIEF OF AMICI CURIAE, PHILLIP J. MACDON-
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TERRENCE R. FLYNN, AND JOSEPH VAN COLLOM,
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QUESTIONS PRESENTED

I.

Whether or not there is a conflict between the South Dakota law which has established a minimum drinking age for low point beer (beer of less than 3.2 percent alcohol by weight) of nineteen years of age and 28 U.S.C. § 158, the national minimum drinking age.

II.

Whether or not the balance of competing interests weighs in favor of the States due to their exclusive right to determine the lawful age for the consumption of alcoholic beverages, which goes directly to the core of the States' authority under the Twenty-first Amendment to regulate the "delivery and use" thereof.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Statement of the Case	1
Interest of Amici Curiae	3
Summary of Argument	4
Argument	5
Introduction	5
STAA Does Conflict With State Laws Which Create a Minimum Drinking Age	9
The Balance of Competing Interests Weighs in Favor of the States Due To Their Exclusive Right to Determine the Lawful Age for the Consumption of Alcoholic Beverages, Which Goes Directly to the Core of the States' Authority Under the Twenty-first Amendment to Regulate the "De- livery and Use" Thereof	13
Conclusion	22
Appendix	App. 1

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	9, 15
<i>Brown-Forman Distillers v. New York Liquor Au- thority</i> , — U.S. —, 106 S.Ct. 2080 (1986)	11, 16
<i>California v. LaRue</i> , 409 U.S. 109, 115 (1972)	5, 8
<i>California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et al.</i> , 445 U.S. 97, 110 (1980)	9, 13, 14, 17
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984)	15
<i>Clark Distilling Co. v. Western Maryland Railroad Company</i> , 242 U.S. 311 (1917)	6
<i>Craig v. Boren</i> , 429 U.S. 180, 206 (1976)	5
<i>Hostetter v. Idelwild Liquor Corp.</i> , 377 U.S. 324, 332 (1964)	13
<i>Larkin v. Grendel's Den, Inc.</i> , 459 U.S. 116 (1982)	15
<i>Leisy v. Harden</i> , 135 U.S. 100 (1890)	6
<i>New York State Liquor Authority v. Ballanca</i> , 452 U.S. 764, 765 (1986)	17
<i>Rice v. Norman Williams Co.</i> , 458 U.S. 654 (1982)	14
<i>The License Cases</i> , 46 U.S. 1504 (1847)	6
<i>324 Liquor Corp. v. Duffy</i> , — U.S. — (1986) (Case No. 84-2022)	16
<i>United States v. Topco Associates, Inc.</i> , 405 U.S. 596, 610 (1972)	16

TABLE OF AUTHORITIES—Continued

	Page
CONSTITUTION	
U.S. Const. Article I, § 8, Cl. 1	13
U.S. Const. amend XVIII	6
U.S. Const. amend XXI	<i>passim</i>
STATUTES	
23 U.S.C. § 158	1
26 Stat. 313 (Current version at 27 U.S.C. § 121)	6
28 U.S.C. § 1254(i)	1
37 Stat. 699 (Current version at 27 U.S.C. § 122)	6
Ill. Rev. Stat. ch. 43 §§ 166 et seq.	8
V.T.C.A. Alcoholic Beverage Code §§ 1.01 et seq.	18
OTHER	
76 Cong. Rec. 4138 (1933)	7, 8
76 Cong. Rec. 4147 (1933)	12
76 Cong. Rec. 4177 (1933)	8
76 Cong. Rec. 4178 (1933)	8

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in *State of South Dakota v. Dole* is reported at 791 F. 2d 628 and appears in the Appendix of Petitioner's Petition for Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was dated and entered May 21, 1986. The Petition for Writ of Certiorari was timely filed on August 18, 1986. This Court's jurisdiction was invoked by the Petitioner under 28 U.S.C. § 1254(1). This Court granted the Petition for Certiorari on December 1, 1986.

STATEMENT OF THE CASE

On July 17, 1984, Congress enacted 23 U.S.C. § 158, an amendment to the Surface Transportation Assistance Act of 1982 ("STAA"), which mandates that each state adopt a minimum drinking age of twenty-one.

STAA will result in a portion of federal highway funds being withheld from any state which failed to enact by October 1, 1986, legislation establishing twenty-one as the minimum drinking age for alcoholic beverages.

The State of South Dakota prohibits the consumption of all alcoholic beverages except "low point beer" by persons under the age of twenty-one.

South Dakota, under the legislation, would have \$4,156,000.00 withheld in 1987 and \$8,312,000.00 in 1988 for its failure to enact the national minimum drinking age of twenty-one years for all alcoholic beverages, including low point beer.

During September of 1984, the Petitioner, State of South Dakota, filed its Complaint for Declaratory Relief wherein it sought, in pertinent part, a declaration from the District Court that STAA was unconstitutional in that it was a usurpation of the States' authority to regulate the delivery and use of alcoholic beverages.

On May 3, 1985, the District Court entered an Order granting the Respondent's Motion to Dismiss the Complaint with prejudice for failure to state a claim upon which relief can be granted.

Petitioner appealed the dismissal of its Complaint to the United States Court of Appeals for the Eighth Circuit on June 26, 1985. That Court affirmed by opinion and judgment dated and filed May 21, 1986. Petitioner timely filed its Petition for Writ of Certiorari on August 18, 1986, which Petition this Court granted on December 1, 1986.

INTEREST OF AMICI CURIAE

Each of the individual Amicus Curiae is employed in some capacity and/or charged with the duty and responsibilities of regulating the manufacture, importation, transportation, distribution, sale and consumption of intoxicating liquors within their respective jurisdictions. A list of the individual Amicus Curiae and their respective capacities of employment is set forth in the Appendix of this brief.

The interests of the Amici are not limited solely to the issue of the minimum drinking age, but rather to the integral relationship between the Twenty-first Amendment and the power of the Federal Government to erode, if not eliminate, the States' rights thereunder.

The filing of the brief of the Amici Curiae is desired so as to present to this Court the far reaching effects of the erroneous decision of the lower court which held that South Dakota, or any State, is not denied its power to regulate the use and possession of alcoholic beverages through the implementation of STAA. Said amendment mandates that each State adopt a minimum drinking age of twenty-one as a condition to receiving its apportioned federal aid highway funds. The lower court further erred in finding that there is no conflict between state and federal interests and, therefore, no need to balance same in determining whether or not the States' sovereignty has been impermissibly threatened.

Rather, the Amici contend, in support of the Petitioner, State of South Dakota, that as a result of the implementation of STAA and the decision of the lower court,

the States will be denied the core of the authority guaranteed by the Twenty-first Amendment.

The lower court has divested the State of South Dakota and each of the other States of their authority to regulate the manufacture, importation, transportation, distribution, sale and consumption of intoxicating liquors. Said authority is derived from the Twenty-first Amendment. This case is, therefore, important since it conflicts with applicable decisions of this Court and other Circuits and effectively does away with the only grant of authority to the States contained in the United States Constitution to regulate a specific industry. Therefore, the issues raised by this appeal are of paramount importance which must be decided by this Court.

SUMMARY OF ARGUMENT

The decision of the Eighth Circuit raises issues of grave concern to the States in that said decision will have the effect of divesting the States of their exclusive authority as mandated by the Twenty-first Amendment to determine the lawful age for the consumption of alcoholic beverages. This exclusive right goes directly to the core of the States' authority under the Twenty-first Amendment to regulate the "delivery and use" thereof.

The lower court erred in finding that STAA does not conflict with any state interest and, therefore, deciding that there is no need to weigh the state interest against the federal interest. The lower court failed to apply the

long-standing and fundamental balancing test to the challenged legislation which failure is contrary to decisions of this Court and of other Circuits.

If the lower court's decision is left undisturbed it will seriously erode, if not eliminate, the significant powers vested in the States by the United States Constitution which grant of said powers followed years of historically significant debates and decisions. Congress will have been permitted to invade rights specifically intended to be delegated to the States under a veil of its spending authority. The States are being held hostage by the challenged legislation which this Court must not permit.

ARGUMENT

Introduction

Congress, tempered by the experience of pre-prohibition, as well as the prohibition era (prior to 1933), uniquely constitutionalized an industry by adoption of the Twenty-first Amendment (December 5, 1933). *Craig v. Boren*, 429 U.S. 190, 206 (1976). Based upon past history, public attitudes and actions, Congress intended to treat liquor separate and apart from other articles of commerce, and delegated jurisdiction over regulatory control of the industry to the states, as opposed to the federal government. *California v. LaRue*, 409 U.S. 109, 115 (1972). Thus, the adoption of the Twenty-first Amendment, placed primary authority as to regulatory control of the alcoholic beverage industry with the States.

This transition to state supremacy is more easily understood by briefly reviewing congressional initiatives and judicial decisions before and after the adoption of the Twenty-first Amendment. Prior to 1890, the states dominated control of liquor. *The License Cases*, 46 U.S. 504 (1847). However, this trend started to change by the late 1800's. *Leisy v. Harden*, 135 U.S. 100 (1890). In 1890, Congress approved the "Wilson Original Packages Act" ("Wilson Act"), 26 Stat. 313 (current version at 27 U.S.C. Section 121) which gave the states authority to regulate liquor, as though produced therein, notwithstanding their introduction in original packages. Passage of the "Wilson Act" was the Congressional beginning of vesting the States with dominant control over regulatory authority of alcoholic liquors. In 1930, Congress expanded upon the theory of state supremacy by enacting the Webb-Kenyon Act, 37 Stat. 699 (current version at 27 U.S.C., Section 122) which prevented shipment of alcoholic liquors into a state against state law. *Clark Distilling Co. v. Western Maryland Railway Company*, 242 U.S. 311 (1917).

During the early 1900's the prohibition movement in the United States was attracting a broad base of public support, and culminated with ratification of the Eighteenth Amendment on January 16, 1919. The Eighteenth Amendment, known as the "noble experiment", officially failed with ratification of the Twenty-first Amendment on December 5, 1933. Tempered by widespread lawlessness, the rise of organized crime and open contempt of federal law, as evidenced by the Congressional Record upon which the Twenty-first Amendment was adopted, it was clearly the intention of Congress to divest itself of primary regulatory power in favor of state control.

As introduced in the Senate, the Twenty-first Amendment contained three substantive sections:

SECTION 1. The Eighteenth Article of amendment to the constitution of the United States is hereby repealed. (adopted)

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. (adopted)

SECTION 3. Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold. (Deleted in Senate) 76 Cong.Rec. 4138 (1933).

Section Three was eliminated by Congress in order to dispel any notion relative to the supremacy of federal regulation of liquor sales. As Senator Wagner pointed out:

"We have expelled the system of national control through the front door . . . and readmitted it forthwith through the back door of Section 3, and that is the ironical result of *an amendment designed to restore to the States control of their liquor problem.*

"If this amendment should become a part of the constitution containing Section 3, it would take away from the State the right the State now has to regulate or prohibit the sale of liquor. *It would take it away by giving that power to Congress . . .*

"Instead of being a movement to permit the States to prohibit the sale of liquor in a saloon, this amendment would deprive the States of the right to prohibit the sale of liquor in a saloon. *Both the State and the Federal Government cannot have the power at the same time. The action of one of them will be the supreme law of the land, and the supreme*

law of every State is the Constitution of the United States. When the Constitution delegates to Congress the right to determine in what way liquor shall be sold in a State, if it is sold, then a law enacted by Congress will be supreme, and the States of this Union will be helpless, they cannot regulate the sale of liquor within their own boundaries, nor can they prohibit it." 76 Cong.Rec. 4138, 4177, 4178 (1933). (Emphasis added)

Thus, the unique constitutional history surrounding the Twenty-first Amendment memorialized the fact that there is no national consensus when it comes to the sale and consumption of alcoholic beverages. In fact, many States have adopted legislation granting voters in small political subdivisions the right to enact laws to determine whether or not alcoholic beverages may be sold within their boundaries.¹ This is illustrative of the fact that there is not even a true intrastate consensus relative to sale and consumption. Rather, these issues are ultralocal in nature and any attempt to nationalize them will only exacerbate what Congress has erroneously perceived to be national problems.

The Twenty-first Amendment is unique in many aspects.

1. It is the only Amendment which repealed a previous Amendment thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product—intoxicating liquors. *California v. LaRue*, 409 U.S. 109, 115 (1972).

¹ See Ill. Rev. Stat. ch. 43, §§ 166 et seq.

2. It was the first, and to date, only Amendment that was ratified by conventions in the states, rather than by state legislatures.

3. It repealed *national* prohibition, but not prohibition. Under Section 2, states still maintain the power to prohibit the manufacture and sale of alcoholic beverages. It represents the only express grant of power to the states.

Subsequent to the adoption of the Twenty-first Amendment, several of the states throughout the United States approved separate acts and regulations pertaining to control and regulation of the alcoholic beverage industry. The statutes and regulations differ considerably from state to state, as they relate to the same subject matter pertaining to alcoholic beverage control, such as manufacturing, distribution, marketing, licensing, pricing, standards of fill, together with the time, place and age of consumption.

STAA DOES CONFLICT WITH STATE LAWS WHICH CREATE A MINIMUM DRINKING AGE.

The lower court correctly noted that:

"... in the area of alcohol regulation, when state and federal law directly conflict, a balancing of the state and federal interests involved may result in state laws prevailing over a conflicting federal enactment. See *Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049, 3058 (1984); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 109 . . ." 791 F.2d at 633.

The court, however, avoided the balancing of interest test by reaching the erroneous conclusion that:

"... Very simply, in this instance, no conflict exists. Both the federal enactment and South Dakota state law are fully operative; neither law undermines the legal force and effect of the other. In fact, the federal law necessarily recognizes the state's power to reject Congress's judgment and adopt and legally maintain any drinking age it chooses. South Dakota is entirely free to maintain its law as it now exists and will violate no federal law if it chooses to do so." 791 F.2d at 634.

The lower court's conclusion ignores not only reality but also the historical framework cited hereinabove. The choice which the lower court says each State has is no more an actual right to choose than is a hostage crisis. STAA offers each State the option of adopting the minimum drinking age Congress deems appropriate, to wit, twenty-one, or losing the right to millions of dollars in federal highway funds. The States, in other words are being coerced into accepting Congress' judgment and abandoning their own localized notions of what is acceptable for its citizens. This coercion is taking place during a period where the States are being subjected to the loss of a host of other federal funding programs due to other acts of Congress.

Besides dangling money over the "head" of each State in exchange for the adoption of the national minimum drinking age, STAA offers yet a second similarity to a hostage scenario. It is often stated that if one succumbs to the ransom demands of terrorists in return for the release of hostages, the door opens wide for future crises. By permitting STAA to stand, a clear message will be sent to Congress that the door is open for further usurpation of the core powers created by the Twenty-first Amendment. For example, Congress may next dictate the hours a liquor licensee may serve its patrons alcoholic

beverages or the types of products which can be served. Perhaps, Congress will decide that a liquor license may be granted only in municipalities which satisfy a minimum population standard.

It is a practical impossibility to find any degree of consistency between STAA and the grant of authority established by the adoption of the Twenty-first Amendment. In actuality, the clash Congress has created is of enormous constitutional magnitude.

In order for the lower court to reach the conclusion that there is no conflict between state and federal laws it first adopted a premise which flies in the face of the Twenty-first Amendment. At page 633 the court below stated that:

"... At bottom while the twenty-first amendment in no way increased Congress's authority to legislate with regard to liquor, the amendment did not limit or withdraw Congress's ability to exercise authority under its existing delegated powers, including the spending power."

Based upon a review of this Court's numerous Twenty-first Amendment decisions throughout the years, it is plain that the lower court's premise is fundamentally wrong. The Twenty-first Amendment clearly limited Congress' authority over the regulation of liquor as it pertains to matters within the State. *Brown-Forman Distillers v. New York Liquor Authority*, — U.S. —, 106 S.Ct. 2080 (1986). The Congressional intent behind the adoption of Sections 1 and 2 of the Twenty-first Amendment and the deletion of Section 3 could hardly be clearer—Congress elected to place in the hands of each State the power to legislate all aspects of the delivery and use of alcoholic beverages, including the determination of a minimum drinking age.

This is best seen by another reference to the 1933 Congressional Record wherein Senator Wagner stated:

"If Congress may regulate the sale of intoxicating liquors, where they are to be drunk on premises, where sold, then we shall probably see Congress attempt to declare what hours such premises may be open, where they shall be located, the sex and age of the purchasers, the price at which the beverages are to be sold." 76 Cong.Rec. 4147 (1933). (Emphasis added.)

Senator Wagner's comments are so clear they are not open to interpretation. State and municipal laws and ordinances relative to licensing and zoning obviously address the issues raised by Senator Wagner and all States have adopted a minimum drinking age as well. A federal minimum drinking age is but the first invasion into an area of legislation peculiarly suited to the States.

It can be seen that despite the lower court's decision, STAA clashes with South Dakota's minimum drinking age law and those of all States. If the decision of the lower court is permitted to stand, the conflict can only be resolved if:

1. South Dakota does without millions of dollars in federal highway funds, potentially leading to dangerous conditions for all drivers and passengers notwithstanding the drinking age; or
2. South Dakota succumbs to the will of Congress and adopts its judgment of a proper minimum drinking age.

Reality dictates the conclusion that an actual conflict exists between state and federal laws requiring the implementation of the balancing of interests test. The lower court erred in its finding that no such conflict exists.

The Balance Of Competing Interests Weighs In Favor Of The States Due To Their Exclusive Right To Determine The Lawful Age For The Consumption Of Alcoholic Beverages, Which Goes Directly To The Core Of The States' Authority Under The Twenty-First Amendment To Regulate The "Delivery And Use" Thereof.

Although the lower court recognized the existence of a test for weighing conflicting interests between state and federal laws, it failed to apply the test holding that no conflict exists. As has been shown herein, there clearly exists a constitutional conflict between the federal interest as derived under the Spending Clause, Article I, § 8, Cl. 1, and the States' interests under the Twenty-first Amendment. Conflicts of this nature can only be resolved through the identification of the competing federal and state interests, together with the application of the traditional balancing of said interests. It is not enough to identify the various competing interests by general statements or platitudes. Rather, as instructed by this Court, there first must be a factual basis presented in order to identify and properly weigh the federal and state interests. As this Court enunciated in *Hostetter v. Idelwild Liquor Corp.*, 377 U.S. 324, 332 (1964):

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other and in the context of the issues and interest at stake in any concrete case. . .

"Competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case." See also *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et al.*, 445 U.S. 79, 110 (1980).

Since 1980, this Court has had several opportunities to apply the balancing test in the context of the Twenty-first Amendment. There is a strong central theme which surfaces from a review of these cases. In each, as a threshold matter, this Court identified the state interest asserted pursuant to the Twenty-first Amendment and whether or not it was related to a core power thereunder. Then the Court identified the competing federal interest. After identifying the respective interests, a determination was made as to whether or not the federal interest was of such a strong and long-standing nature, that it must prevail over the state interest. If such a long-standing federal interest could not be identified the balancing test would favor the State's authority pursuant to the core power under the Twenty-first Amendment.

In 1980, this Court decided *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), wherein it was held that a California statute was invalid in that it mandated resale price maintenance, an activity long regarded as a per se violation of the Sherman Act. The enunciated state interests were the promotion of temperance and the preservation of orderly market conditions. Such interests were outweighed by the age old national policy in favor of competition.

So to in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982) this Court was faced with a Sherman Act challenge to a California Designation Statute. The purpose of the statute was to encourage interbrand competition, and, therefore, the statute on its face violated no federal interest.

Next, in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the long-standing federal interest under the Establishment Clause outweighed the state interest in delegating to religious institutions the decision-making authority relative to the proximity of liquor licensees to such institutions.

In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) this Court held that the Federal Communications Commission, over the past 20 years and on an exclusive basis, preempted state and local regulation of any type of signal carried by cable television systems, and, further, that the Twenty-first Amendment did not save Oklahoma's advertising ban from pre-emption as a result of the State's very limited interest, since the State's ban was directed only at occasional wine commercials appearing on out-of-state signals carried by cable operators, while the State permitted advertisements for all alcoholic beverages carried in newspapers and other publications printed outside Oklahoma but sold in the State.

Also in 1984, this Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), weighed the federal interest under the Commerce Clause against the asserted state interest pursuant to the Twenty-first Amendment. The state attempted to promote local business by imposing taxes which discriminated against non-local business. This Court held that the Twenty-first Amendment could not be utilized to discriminate in interstate commerce, another long-standing and much protected federal interest.

In *Brown-Forman Distillers v. New York State Liquor Authority*, — U.S. —, 106 S.Ct. 2080 (1986) it was reaffirmed that the States', pursuant to the Twenty-first Amendment, possess the right to regulate the sale and consumption of alcoholic beverages within its borders. The federal interest pursuant to the Commerce Clause, however, prevailed over New York's attempt to regulate, extraterritorially.

In each of the above cited cases it can be seen that a long-standing and critical federal interest must be identified in order to outweigh a state interest claimed under the Twenty-first Amendment. In fact, this Court as recently as January 13, 1987, invalidated a New York price maintenance statute in *324 Liquor Corp. v. Duffy*, — U.S. — (1986) (Case No. 84-2022) and explained the outcome of the balancing test:

"In this case, as in *Midcal*, the States' unsubstantiated interest in protecting small retailers 'simply [is] not of the same stature as the goals of the Sherman Act.' 445 U.S., at 114. New York's resale price maintenance system directly conflicts with the 'familiar and substantial' federal interest in enforcement of the antitrust laws. *Id.*, at 110. '*Antitrust laws in general, and the Sherman Act in particular . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.*' *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)." (Emphasis added.)

It is plain, therefore, that a paramount interest of the nature described by this Court in *324 Liquor*, *supra*, must be identified before a core power of the Twenty-first Amendment must yield. Nowhere has Congress identi-

fied such a long-standing federal interest to justify the implementation of STAA.

The lower court has disrupted the clear and continuous line of decisions cited above which grant plenary regulatory authority to the States on matters related to the core powers of the Twenty-first Amendment. If the lower court's ruling is left to stand it will surely cause nationwide confusion in the regulation of a sensitive product, all to the detriment of the public interest. This is an unjustifiable impact based merely upon the unsupportable and inherently false notion that Congress has a greater interest in highway safety than the states.

States possess almost unlimited authority to regulate the "times, places and circumstances under which liquor may be sold." *New York State Liquor Authority v. Balanca*, 452 U.S. 764, 765 (1986). They have and continue to exclusively determine the drinking age for alcoholic beverages. Historically, state enactments under the Twenty-first Amendment have overwhelmingly survived legal challenges based upon perceived violations of other federal statutory and constitutional provisions. In each instance, the Court has carefully scrutinized the competing federal and state interests. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et al.*, 445 U.S. 79, 110 (1980).

State supremacy in the regulation of the beverage alcohol industry is not without justification. History makes clear the fact that consumption of alcohol is an exceedingly local decision. The desires, social mores, perceptions of the need to be protected and the like of citizens

in one community do not mirror those of other communities. And this is true both on an intrastate and interstate basis. For example, twenty-one year old Texans possessing a valid driver's license may legally consume beer while operating a motor vehicle,² while Illinois counterparts cannot.

As another example, after numerous years of prohibiting "liquor by the drink", the voters of the states of Kansas and Oklahoma approved referenda wherein the sale of "liquor by the drink" was legalized subject to county option. These enactments are clear expressions of local beliefs which are not necessarily consistent or even reconcilable with those of other localities.

Recognizing the inherently local interest surrounding the consumption of alcoholic beverages and the absence of a format to establish any degree of national consistency therein, the Twenty-first Amendment emerged as the only real answer to regulation. That is to say, each State was empowered to determine the rights and duties its citizenry must accept. This grant of authority makes each State responsible for the decision-making process relative to the core powers such as a minimum drinking age.

On the other hand, STAA divests the States of that sacred responsibility and mistakenly places it in the hands of Congress. STAA, therefore, promotes State irresponsibility by promulgating the notion of "let someone else decide," i.e., the federal government.

² V.T.C.A. Alcoholic Beverage Code § 1.01 et seq.

The entire thrust of STAA is Congress' mandating of a minimum drinking age. Once a State adheres to the mandate, the federal government has but one further act to perform, to wit, paying the State apportioned highway funds. At all times thereafter, it is the State which bears the burdens and responsibilities associated not only with liquor sales and consumption, but also highway safety. The State must:

1. enforce the minimum drinking age;
2. enforce laws against drunk driving regardless of age;
3. enforce the manner in which all drivers utilize motor vehicles and highways;
4. enforce laws having anything whatsoever to do with the sale of on-premise and off-premise consumption;
5. enforce laws allowing voters of a political subdivision to decide whether said subdivision should be "wet" or "dry"; and
6. create, monitor and control an entire panoply of other state and/or local regulations which involve the delivery and use of alcoholic beverages.

The above non-exclusive list applies to each of the fifty states. There is no uniform set of laws which control the components of the list. Rather, there are *fifty different comprehensive statutory schemes* which reflect the localized needs and desires of the citizens. The authority for permitting such diverse ways of thinking is the Twenty-first Amendment. In point of fact, it was

Congress' will and desire as seen by the above references to the 1933 Congressional Record that the states legislate the liquor industry, including consumption because state lawmakers are more in tune and in touch with the peculiar needs of the inhabitants of the state. It could hardly be argued that the needs and desires of the citizens of South Dakota are exactly the same as those of the citizens of Arizona for example.

This Court must not permit Congress, under the guise of utilizing its spending powers, to usurp the rights of state legislators to regulate the delivery and use of alcoholic beverages. Such will be the case if the Eighth Circuit's decision stands. In effect, proposed Section 3 to the Twenty-first Amendment which was deleted fifty-three years ago will be reinserted.

It must be remembered that this cause was disposed of at the trial court level on Respondent's Motion to Dismiss. Therefore, absolutely no evidence of any kind was presented to the court demonstrating that the federal government's interest in highway safety is equal to, let alone greater than, that of the state. In point of fact, had an evidentiary hearing been conducted, it is the position of *Amici Curiae* that the court would have been convinced that the States have an interest in highway safety which exceeds that of the federal government and when coupled with the States' overwhelming interest in regulating intrastate liquor consumption pursuant to the Twenty-first Amendment, would have struck STAA.

Thus, the federal government has failed to show any interest greater than that of the states in highway safety or the delivery and use of alcoholic beverages. Further, the lower court has overemphasized the importance of the tenuous relationship between the creation of a national drinking age and highway safety. More importantly, the ability of the state to determine the lawful age of consumption is not incidental, but rather at the core of the States' exclusive right to regulate the "delivery and use" of alcoholic beverages within its borders. The States' central power under the Twenty-first Amendment is directly implicated, and STAA must fall.

The principles as enunciated by the lower court, if permitted to stand, will jeopardize the regulatory primacy which has been vested in the States as a result of over fifty years of constitutional, legislative and judicial direction. Considering the sensitive and emotional nature of alcoholic beverages in today's society, the public interest appeal of the *Amici* is no less important, but rather much greater than the federal government's enunciated interest in highway safety.

CONCLUSION

The Amici need not attempt to expand Petitioner's discussion of each of the issues raised by this appeal. Rather, the Amici have confined themselves to what they believe are the dispositive issues and that which is central to their interests. As previously stated, the lower court did not engage in a careful scrutiny of the competing interests, which the Amici contend would have resulted in the striking of a balance in favor of the State of South Dakota and the invalidation of STAA.

Pursuant to STAA, states which failed to take action by October 1, 1986, will fall victim to the federal sanctions and lose five percent of their federal highway funds in fiscal year 1987, and an additional ten percent in 1988. The federal government cannot, under the guise of the Spending Clause, usurp from the states their authority to regulate the use and consumption of alcoholic beverages within their borders. For the lower court to hold that STAA merely provides strong incentive for the states to waive their rights under the Twenty-first Amendment, belies the political and practical realities of state government. It is inconceivable that elected state officials could risk the political consequences of losing millions of dollars of sorely needed revenue. Their constituents paid millions of dollars in federal taxes which were directed for redistribution for highway use, yet without succumbing to STAA's demands, they will receive not a penny in benefits. Thus, we are not talking about mere coercion, but rather the outright extinguishment of the exclusive rights of the States which have been guaranteed by the Twenty-first Amendment. The age at which alcoholic beverages may

be consumed, just as the time, manner and place, are not, as was Oklahoma's partial ban on certain advertising, indirectly related to the regulatory scheme. They are at the core of, and central to the powers expressly and exclusively granted to the states by the Second Section of the Twenty-first Amendment to regulate the "delivery or use thereof."

The decision of the lower court is merely the first attempt at the adoption by indirect means, of the proposed and rejected Third Section to the Twenty-first Amendment, which would have granted the federal government concurrent power to regulate or prohibit the sale of intoxicating liquors. Therefore, the decision of the Eighth Circuit must be reversed and STAA stricken as it is in violation of the Twenty-first Amendment.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

11
CASE NO. 86-260

In The
Supreme Court of the United States

Supreme Court, U.S.
FILED

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OCTOBER TERM 1986

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Petitioner,

v.

THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
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IN HER OFFICIAL CAPACITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
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MONTANA, OHIO, SOUTH CAROLINA, TENNESSEE,
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TABLE OF CONTENTS

	PAGE	
TABLE OF AUTHORITIES	ii	
INTEREST OF AMICI CURIAE	1	
SUMMARY OF ARGUMENT	3	
ARGUMENT	4	
I. THE TWENTY-FIRST AMENDMENT RESERVES TO THE STATES THE POWER TO REGULATE THE CIRCUMSTANCES UNDER WHICH LIQUOR MAY BE SOLD WITHIN THEIR BORDERS		4
II. THE FEDERAL STATUTE'S REQUIREMENT THAT THE STATES ENACT LAWS IN COMPLIANCE WITH THE NATIONAL DRINKING AGE OR BE SUBJECT TO SANCTIONS IS UNCONSTITUTIONAL		9
A. THE PROVISIONS OF 23 U.S.C. § 158 WHICH WITHHOLD FEDERAL HIGHWAY ENTITLE- MENT FUNDS INDIRECTLY ACCOMPLISH WHAT CONGRESS IS PROHIBITED FROM DOING DIRECTLY BY THE TWENTY-FIRST AMENDMENT		9
B. CONGRESS MAY NOT USE ITS POWER UNDER THE SPENDING CLAUSE OF ARTICLE I TO REGULATE THE STATES' EXERCISE OF THEIR POWERS UNDER THE TWENTY-FIRST AMENDMENT		10
CONCLUSION		18
APPENDIX		A1

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Anderson v. Dunn</i> , 19 U.S. (6 Wheat.) 204 (1821)	17
<i>California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980)	6, 7
<i>California v. LaRue</i> , 409 U.S. 109 (1972)	5, 6
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	5
<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1980)	12
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , 469 U.S. 528 (1985)	16
<i>Harris v. McRae</i> , 488 U.S. 297 (1980)	13
<i>Helvering v. Davis</i> , 301 U.S. 619 (1937)	10
<i>King v. Smith</i> , 392 U.S. 309 (1968)	12
<i>Lawrence County v. Lead-Deadwood School District</i> , 469 U.S. 256 (1985)	3, 12
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	6
<i>New State Ice Co. v. Liebmann</i> , 285 U.S. 262 (1932)	17
<i>New York State Liquor Authority v. Bellanca</i> , 452 U.S. 714 (1981)	3, 4
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969)	13
<i>Pennhurst State School and Hospital v. Halderman</i> , 451 U.S. 1 (1981)	12
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	4, 13
<i>South Dakota v. Dole</i> , 791 F.2d 628 (8th Cir. 1986)	12, 13, 14
<i>State Board v. Young's Market Co.</i> , 299 U.S. 59 (1936)	6
<i>Steward Machine Co. v. Davis</i> , 301 U.S. 458 (1937)	11
<i>Thomas v. Review Board</i> , 450 U.S. 707 (1981)	13
<i>United States v. Butler</i> , 297 U.S. 1 (1936)	10
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	17
CONSTITUTIONAL PROVISIONS:	
U.S. Const. art. I, § 8, cl. 1	<i>passim</i>
U.S. Const. art. I, § 8, cl. 3	<i>passim</i>
U.S. Const. amend. XXI	<i>passim</i>

TABLE OF AUTHORITIES *cont'd***STATUTES:**

23 U.S.C. § 158 (1984)	<i>passim</i>
Act 117, 1985 Acts and Joint Resolutions of the General Assembly of the State of South Carolina, § 4	11
Ohio Rev. Code Ann. § 4301.22 (Page Supp. 1985)	15
Ohio Rev. Code Ann. § 4511.19 (Page Supp. 1985)	15, 16
Ohio Rev. Code Ann. § 4511.99 (Page Supp. 1985)	16

LEGISLATIVE HISTORY:

76 Cong. Rec. (1933)	3, 7, 8, 9
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INTEREST OF THE AMICI CURIAE

Pursuant to Rule 36.5 of the Rules of the Supreme Court of the United States, the States identified above submit this brief as *amici curiae* in support of the Petitioner, the State of South Dakota. The legislatures of each of the States joined herein have considered bills which would raise the drinking age within their respective jurisdictions to twenty-one. Further, the State of Ohio has presented a referendum to its electorate on precisely this issue. Some of the States have retained statutes permitting the consumption of alcoholic beverages by persons under twenty-one years of age. Other States previously had such statutes, but subsequently modified them solely to comply with the national drinking age requirement, and to avoid the appurtenant sanctions set out in 23 U.S.C. § 158.

Under the provisions of 23 U.S.C. § 158, those States which did not enact laws in conformity with the national drinking age standard by October 1, 1986, are subject to sanctions imposed by the Secretary of the Department of Transportation: namely, the withholding of federal highway entitlement moneys.¹ While some of the *amici* States have adopted statutes in conformity with the new federal mandate, their reluctance to do so is clearly demonstrated by several resolutions adopted by these States.²

Finally, the *amici* emphatically take issue with the Respondent's suggestion in the court below that States which have not adopted laws in conformity with the national drinking age standard are unconcerned with the problems caused by persons who drive while intoxicated. See the Eighth Circuit Brief for the Appellee at 22. These allegations represent a simple untruth. The States have demonstrated, through varying approaches, a strong commitment to resolving the problems caused by persons who drink and drive. Although the Respondent suggested otherwise, the federal action complained of by the State of South Dakota is not prompted by a disagreement over *whether* the States should promote highway safety, but rather *how* to best implement a program to effectively control drunk drivers, and *who* should make these decisions. For this reason, the *amici* take no position on the issue of an appropriate drinking age. They do, however, firmly and uniformly believe that the establishment of a national drinking age clearly usurps the powers reserved to the States under the Constitution.

¹ Attached is Appendix A, listing estimates of federal highway funds which are being withheld from several of the *amici* States whose laws fail to conform with the new federal mandate. Also listed are the amounts of the federal highway funds which would have been withheld from *amici* States had they not changed their drinking age laws to conform with the national standard.

² Appendix B sets out the resolutions adopted by the legislatures of two *amici*, demonstrating the reluctance of these States to adopt the national standard set out in 23 U.S.C. § 158 and suggesting that, but for the sanction involved, the States would not have enacted statutes in conformity therewith.

SUMMARY OF ARGUMENT

In July of 1984, Congress adopted 23 U.S.C. § 158, which provides for a national minimum drinking age of twenty-one years of age. States that do not raise their minimum drinking age to twenty-one are subject to sanction imposed by the Secretary of the Department of Transportation. The sanction imposed is the withholding of State highway entitlements. The Twenty-first Amendment grants to the States broad power to regulate the circumstances under which liquor may be sold within their borders. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 716 (1981). The *amici* therefore contend that 23 U.S.C. § 158 is unconstitutional because the withholding of highway funds in order to effectuate the imposition of a national drinking age upon the States infringes upon the powers reserved to the States under the Twenty-first Amendment.

The Eighth Circuit held that the States' power to regulate alcohol consumption within its borders is founded in its general police powers, not the Twenty-first Amendment. Therefore, the court held, Congress was constitutionally permitted to act in the area of alcohol regulation under the Commerce Clause and pursuant to its spending powers. However, the historical context in which the Twenty-first Amendment was adopted and the history of the amendment clearly demonstrate that the Twenty-first Amendment reserves broad power to regulate alcohol consumption to the individual States. 76 Cong. Rec. 4145-48 (1933). Therefore, Congress's attempt to interfere with the States' sovereign powers in that regard is unconstitutional.

The *amici* further contend that, although Congress may generally condition the receipt of federal funds in the exercise of its spending power, these conditions may not infringe upon a constitutionally granted power. *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 269-70 (1985). Since 23 U.S.C. § 158 conditions the States' receipt of highway entitlements on the willingness of the States to relinquish their power to regulate the circumstances under which liquor may

be sold within their borders under the Twenty-first Amendment, the statute is an invalid exercise of Congress's spending power. *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963).

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT RESERVES TO THE STATES THE POWER TO REGULATE THE CIRCUMSTANCES UNDER WHICH LIQUOR MAY BE SOLD WITHIN THEIR BORDERS.

The court of appeals incorrectly ruled that the States' authority to establish a minimum drinking age does not flow from the Twenty-first Amendment. The Twenty-first Amendment clearly grants to the States the broad power to regulate the times, places, and circumstances under which liquor may be sold. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 716 (1981).

The Twenty-first Amendment to the Constitution, as ratified by the States, provides:

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The Twenty-first Amendment shifted the power to control the importation and use of intoxicating liquors from the federal government, which had been granted power to enforce national prohibition under the Eighteenth Amendment, to the States. Section 1 of the Twenty-first Amendment effectuated this shift of power by repealing the Eighteenth Amendment and the powers that it granted to Congress to enforce national prohibition.

However, the ratification of the Twenty-first Amendment did more than just end national prohibition. Section 2 provides the States with expanded power to regulate interstate commerce in intoxicating liquors. Congress specifically included Section 2 in the Twenty-first Amendment as a means to limit its own power under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) and to expand the power of the States in the area of intoxicating liquors. This Court has held that Section 2 of the Twenty-first Amendment was primarily created as an exception to the Commerce Clause. *Craig v. Boren*, 429 U.S. 190, 206 (1976). This exception gives the States expanded power to control the interstate commerce of intoxicating liquors by decreasing, though not eliminating, Congress's authority to regulate interstate commerce when the commodity regulated is liquor.

In considering South Dakota's argument that the enactment of 23 U.S.C. § 158 violated the Twenty-first Amendment, the Eighth Circuit focused on Section 2 of the Amendment and incorrectly held that Congress's authority to legislate under the Commerce Clause is unaffected by the Twenty-first Amendment. The court of appeals determined that the States' power to regulate the consumption of alcohol within the State flowed only from its police power rather than from the Twenty-first Amendment. However, this Court has held:

While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring

something more than the normal state authority over public health, welfare, and morals.

California v. LaRue, 409 U.S. 109, 114 (1972). Thus, the Twenty-first Amendment does give the States increased power when regulating intoxicating liquors. Conversely, Congressional authority to enact legislation concerning intoxicating liquors is proportionately reduced.

In past cases this Court has focused primarily on the language of the Twenty-first Amendment, rather than on the history behind it, to determine State powers under the Amendment. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-07 (1980); *State Board v. Young's Market Co.*, 299 U.S. 59, 63-64 (1936). However, both of those cases were clearly cases concerning interstate commerce and fell under Section 2 of the Twenty-first Amendment regarding the importation of intoxicating liquors from one State into another.

The case that is now before this Court is significantly distinguishable from those cases. This case does not involve State laws which establish the prices for imported liquors as in *California Retail*, or which impose a license fee on importers as in *Young's Market*. In the present case Congress has usurped the broad power of the States to control the circumstances of consumption of intoxicating liquor within their borders by establishing a minimum drinking age that a State must adopt or be penalized by the loss of millions of dollars in federal highway funds. This case involves a federal statute which infringes on the States' power to regulate the circumstances under which intoxicating liquor may be sold within its borders; it does not involve the effect of a State law on interstate commerce.

The full extent of the purpose of the adoption of the Twenty-first Amendment is not apparent from a facial reading of that Constitutional provision. It cannot be forgotten that this is a "Constitution which [this Court is] expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat. 316 (1819).

Therefore, the Amendment should not be subjected to the same restrictive reading commonly accorded statutory law. It is thus necessary to examine the historical context in which the Amendment was considered, as well as the policy underlying its adoption. This Court has noted that some statements in the Congressional Record during the discussion of Section 2 of the Twenty-first Amendment are inconsistent. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 n.10 (1980). However, one important portion of the history behind the Twenty-first Amendment is uncontradicted. When the Twenty-first Amendment was introduced in the United States Senate as S.J. Res. 211, it contained an additional section:³

Section 3. Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.

The Senate chose to eliminate this section before adopting the resolution. The reasons for this section's rejection were clearly defined, and demonstrate the intention of the Senate with regard to the respective powers of Congress and the States under the Twenty-first Amendment. There are no inconsistencies in the Congressional Record during the debate of Section 3, unlike the debate of Section 2. Congress intended to give the States broad power to regulate the consumption of intoxicating liquors within their borders.

Senator Wagner, a sponsor of the bill, stated in the debate over Section 3 that:

The inevitable consequence of section 3 will be that the liquor question will continue to bedevil national politics

³ As proposed in the Senate, S.J. Res. 211 contained four sections. The first two sections were adopted without change. The fourth section was subject to a minor revision; the section originally required ratification by the legislatures of the several states. This was changed to require ratification by State "conventions." The section was also renumbered as Section 3 following the rejection of the proposed section.

... [Section 3] is the kind of provision which unavoidably leads to confusion, conflict, and litigation. Ultimately, of course, the history of "concurrent power" under this new amendment would not differ from that of "concurrent power" under the eighteenth amendment. Instead of "concurrent," the power of Congress will be dominant and absolute over the States. No other result is possible. Two sovereignties in conflict can not both prevail. In this instance, as in every other instance, it will be the national and not the State authority which will be supreme; and that is the ironical result of an amendment designed to restore to the States control of their liquor problem.

76 Cong. Rec. 4145 (1933).

Before the debate on the proposed Section 3 was completed, the issue of whether to delete Section 3 was posed as a choice between regulation of intoxicating liquors by either the States or the federal government. As Senator Wagner noted, "[t]he problem confronting us ... is to choose between two alternative courses. Either the control of the local liquor traffic is to remain in the Federal Government or [it] is to be restored to the States." 76 Cong. Rec. 4148 (1933). The elimination of Section 3 clearly indicates that the Senate chose not to grant concurrent power to Congress, but instead chose to return the power to regulate intoxicating liquors to the States.

Senator Wagner expressed the potential problems of granting concurrent State and federal power in the area of intoxicating liquors, and portrayed the conflict now before this Court with accurate foresight:

If Congress may regulate the sale of intoxicating liquors where they are to be drunk on the premises where sold, then we shall probably see Congress attempt to declare during what hours such premises may be open, where they shall be

located, how they shall be operated, the sex and age of the purchasers, [and] the price at which the beverages are to be sold. (Emphasis added.)

76 Cong. Rec. 4147 (1933).

Even though proposed Section 3, with its grant of power to Congress, was eliminated from the Twenty-first Amendment, the problem that Senator Wagner foresaw and expressed to the Senate has still emerged. Congress did exceed its power with respect to intoxicating liquor by regulating the minimum age at which States may permit drinking without incurring a penalty.

II. THE FEDERAL STATUTE'S REQUIREMENT THAT THE STATES ENACT LAWS IN COMPLIANCE WITH THE NATIONAL DRINKING AGE OR BE SUBJECT TO SANCTIONS IS UNCONSTITUTIONAL

A. THE PROVISIONS OF 23 U.S.C. § 158 WHICH WITHHOLD FEDERAL HIGHWAY ENTITLEMENT FUNDS INDIRECTLY ACCOMPLISH WHAT CONGRESS IS PROHIBITED FROM DOING DIRECTLY BY THE TWENTY-FIRST AMENDMENT.

The law which the Petitioner challenges was enacted in July of 1984 as an amendment to the Surface Transportation Assistance Act of 1982. The 1984 amendment provided that:

(a)(1) The Secretary [of Transportation] shall withhold 5 per centum of [a state's highway funds] ... on the first day of the fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

(2) The Secretary [of Transportation] shall withhold 10 per centum of [a state's highway funds] ... on the first day of the fiscal year succeeding the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

23 U.S.C. § 158 (1984). In the foregoing pages, it has been demonstrated that the Twenty-first Amendment reserves to the States the broad power to regulate the sale of alcoholic beverages within their borders. Thus, any attempt by Congress to establish directly a national drinking age would clearly infringe upon these broad powers. This is precisely what Congress has indirectly attempted to do through the enactment of 23 U.S.C. § 158. By attaching the overt threat of substantial sanctions to the "choice" of noncompliance with the new federal mandate, Congress in effect employs the state legislatures as a vehicle for the accomplishment of its policies. As will be demonstrated in the following section, such indirect regulation violates the Twenty-first Amendment as certainly as a direct congressional mandate.

B. CONGRESS MAY NOT USE ITS POWER UNDER THE SPENDING CLAUSE OF ARTICLE I TO REGULATE THE STATES' EXERCISE OF THEIR POWERS UNDER THE TWENTY-FIRST AMENDMENT.

Both lower courts upheld the constitutionality of 23 U.S.C. § 158 by reference to Congress's spending power, which is contained in article I, section 8, clause 1 of the United States Constitution. Congress's authority to exercise its spending power is not limited by its other legislative powers. *United States v. Butler*, 297 U.S. 1 (1936). The spending power may be exercised broadly in order to further the general well-being of the nation. *Helvering v. Davis*, 301 U.S. 619 (1937).

There are, however, limits to the use of the spending power, and a statute is subject to attack if Congress exceeds

its powers in that regard. Congress may not use its spending power as a "weapon[] of coercion, destroying or impairing the autonomy of the states." *Steward Machine Co. v. Davis*, 301 U.S. 548, 586 (1937). While it appears that this Court has not previously found an instance in which the spending power was used coercively,⁴ this principle remains intact. Congress may not use its spending power coercively in order to regulate an area into which it may not enter.

The coercive nature of the statute involved herein is evidenced from the reactions of the States to passage of the national minimum drinking age. As opposed to the positive response to the unemployment tax noted in *Steward Machine Co. v. Davis*, 301 U.S. at 588, South Carolina changed its drinking age only because of the imminent loss of highway funds. In fact, that state was so reluctant to raise its drinking age that it provided in its legislation that:

SECTION 4. If Public Law 98-363 is enjoined by a court of competent jurisdiction or declared by a court to be contrary to the United States Constitution, the provisions of Section 61-9-40, 61-9-455, and 20-7-730 of the 1976 Code shall be effective under the terms and conditions as existed prior to the amendments in Sections 1, 2, and 3.

Act 117, 1985 Acts and Joint Resolutions of the General Assembly of the State of South Carolina, § 4 (Appendix B). The loss of millions of dollars necessary for highway maintenance is a stark reminder that Congress intends that the individual States subject themselves to federal control for the purpose of deciding the legal drinking age.

Furthermore, while this Court has been consistent in its rulings that Congress may condition the States' receipt of federal funds, those rulings involved conditional grants of money wherein the conditions attached to the use of money in

⁴In *Steward* the Court found that the individual States wanted to act in the area of unemployment but feared doing so in the absence of a majority of the States also taking action because of the economic effect on its domestic companies. *Steward v. Davis*, 301 U.S. at 588 n.9.

the same program. For example, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), a State's receipt of federal funds for local public works projects was conditioned on the State's use of at least ten per cent of those funds for the purchase of services or supplies from businesses owned by members of a minority. However, in the case of the national minimum drinking age, the legislation requires the Secretary to withhold highway maintenance funds from the States that fail to raise their drinking age. Even in an exercise of its spending power, Congress must act rationally. There is no nexus between the maintenance of highways and the age at which a State allows an individual to consume alcoholic beverages. This Court has scrutinized legislation to determine whether Congress's objectives are rationally based in the programs it funds. See *id.* at 480-82. Congress's objective of establishing a national minimum drinking age is not rationally based in a program that funds highway maintenance.

Finally, even though Congress may, as a general rule, expend federal funds to promote the general welfare, the legislation may not violate an independent constitutional bar. *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 269-70 (1985). Indeed, this Court has acknowledged that there are certain "'constitutional difficulties' with imposing affirmative obligations on the States pursuant to the spending power." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 n.13 (1981). The ability of the federal government to impose conditions on the expenditure of its money is subject to a controlling constitutional bar. *King v. Smith*, 392 U.S. 309, 333 n.34 (1968). Because the Eighth Circuit incorrectly held that the States' ability to regulate the drinking age does not flow from the Twenty-first Amendment, *South Dakota v. Dole*, 791 F.2d 628, 632 (8th Cir. 1986), the court did not hold that Congress was constitutionally barred from exercising its spending power in the area of alcohol consumption. However, as demonstrated above, the Twenty-first Amendment clearly reserves to the States the authority to regulate the drinking age and, as such, operates as an independent, controlling constitutional bar to Congress's activity in that regard.

Because the Eighth Circuit incorrectly held that the States do not possess a constitutionally based right to regulate the drinking age, *id.* at 634, it rejected the argument that the States had been coerced into waiving a constitutionally protected right. However, the *amici* submit that the States, who are granted broad regulatory powers under the Twenty-first Amendment, stand in much the same position as private citizens who are accorded the full array of individual rights under the Constitution. For example, the Supreme Court ruled unconstitutional an interpretation of the South Carolina Unemployment Security Commission, which had denied compensation to a Seventh Day Adventist who refused to accept employment requiring her to work on her sabbath. *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court reasoned:

[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Sherbert v. Verner, 374 U.S. at 406. Under this same rationale, this Court has consistently ruled that the government may not condition a benefit or entitlement upon a person's willingness to forego a constitutional right.⁵

The States here stand in the same relation to the federal government as did Sherbert to the State of South Carolina. Sherbert enjoyed the explicit constitutional guarantee of the free exercise of religion, which she was being required to waive to receive her unemployment benefits. Here, the States enjoy the constitutional power to regulate the sale of liquor within their borders, and the federal government is requiring the States to waive this right to receive their highway funds.

This Court rejected the argument that constitutional rights were not implicated in *Sherbert* simply because Sherbert had

⁵See e.g., *Thomas v. Review Board*, 450 U.S. 707 (1981); *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980); and *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969).

the choice of foregoing unemployment benefits. It is equally unacceptable to reason — as the courts below did — that constitutional rights are not implicated here because the States have the choice of foregoing highway entitlements. The interference with the constitutional right arises when the benefit can only be obtained after the beneficiary has agreed to curtail the exercise of a constitutional right. Because 23 U.S.C. § 158 calls upon the States to yield to federal pressure in the exercise of their Twenty-first Amendment authority, the *amici* submit that the national minimum drinking age law is unconstitutional.

The Eighth Circuit further held that Section 158 does not require South Dakota to change its laws and that the State is "entirely free to maintain its law as it now exists." *South Dakota v. Dole*, 791 F.2d at 634. Therefore, the court implicitly held that 23 U.S.C. § 158 is not coercive. As noted above, the statute is coercive because it requires the States to adopt the national regulation instead of following their own regulation. The coercive nature of the statute cannot be excused on the ground that it is a necessary means to force reluctant States to promote safety on the highways. The States have not been reluctant to promote highway safety but have done so in accord with their own dictates and have regulated the consumption of alcohol, pursuant to their powers under the Twenty-first Amendment, by rules they deemed appropriate. The States' concern over the problem of highway safety is evidenced by their enactment of statutes imposing civil liability and criminal penalties for driving while intoxicated as well as statutes proscribing the sale of alcoholic beverages to persons below a given age.

Certainly, the proscription of the sale of alcoholic beverages to persons below a determined age has been an important element in the States' attempts to control the problem of drunk driving. In the State of Ohio, for example, the issue has been the subject of intense debate both among the State's electorate and within the State's legislature. Ohio's drinking age law dates back to Section 1 of the Act of April 5, 1866, by which it was made unlawful for any person to furnish

intoxicating liquor to a minor, knowing him to be such, with intent that the minor should drink the intoxicating liquor. Over the past 120 years Ohio's law has been amended several times in response to the recognized needs of its citizens. The current law, Ohio Rev. Code Ann. § 4301.22 (Page Supp. 1985), was last amended in 1983 and provides that "[n]o beer shall be sold to any person under nineteen years of age; and no intoxicating liquor shall be sold to or handled by any person under twenty-one years of age" Prior to 1983, Ohio law had been amended to proscribe the sale of beer to persons under 18 years of age. The choice not to further modify this law was at least in part motivated by a referendum placed before the Ohio electorate which, if adopted, would have raised the drinking age for all alcoholic beverages to twenty-one.⁶ The referendum was overwhelmingly rejected by the Ohio electorate. This decision does not, however, signify a lack of concern on the part of Ohio's citizenry. Instead, it represents the judgment of the people of Ohio that the placement of further restrictions on the drinking age was not the proper method to control the problems caused by persons who drive while intoxicated.

As is indicated by the defeat of this referendum, the proscription of the sale of alcoholic beverages to persons under a determined age is not the only means to effectively deal with the problem of drunk driving. The State of Ohio, presumably much like every State in the Union,⁷ has instituted a program to control drunk driving through the prohibition of the operation of a vehicle by any person who is "under the influence of alcohol or any drug of abuse or the combined influence of alcohol and any drug of abuse." Ohio Rev. Code

⁶ See Appendix C.

⁷ See e.g., Colo. Rev. Stat. § 42-4-1202 (1982); Hawaii Rev. Stat. § 286-151 (1967); Kan. Rev. Code Ann. § 8-1567 (Supp. 1985); La. Rev. Stat. Ann. § 32:391 (West 1978); Mont. Code Ann. § 32-2142 (1977); S.C. Ann. § 56-5-2930 (1983); Tenn. Code Ann. § 55-10-401 (1980); Vt. Stat. Ann. tit. 23, § 1201 (1983); Wyo. Stat. § 31-5-233 (1985).

Ann. § 4511.19 (Page Supp. 1985). Previously, Ohio law had provided that persons who violated this section were subject to a penalty of three days' imprisonment, which could be served through attendance at driver education presentations. In addition, the violator's motor vehicle operator's license could be suspended. Ohio Rev. Code Ann. § 4511.99(A) (Page 1983), *as amended*, Ohio Rev. Code Ann. § 4511.99(A) (Page Supp. 1985). In March of 1983, this law was strengthened to provide for a mandatory minimum penalty of three consecutive days' imprisonment. The 1983 amendment also provided for the imposition of a fine "of not less than one hundred fifty nor more than one thousand dollars." Ohio Rev. Code Ann. § 4511.99(A) (Page Supp. 1985). As is demonstrated by a recent study by Purdue University, this legislative program has been successful, resulting in a twenty per cent reduction in accidents caused by drunk drivers.⁹

Thus, as is exemplified by the program of the State of Ohio, it is evident that the impetus behind the congressional choice to provide a "national standard" through the enactment of 23 U.S.C. § 158 cannot properly be said to be ineffectiveness on the part of the States. Rather, the federal action is prompted by a simple disagreement over the means of implementing a program to effectively control drunk drivers. The States' programs are not ineffective; they are just different.

It is precisely this legislative diversity which the Court has recognized as a goal of American Federalism. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), Justice Blackmun wrote for the majority that "[t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal" *Id.* at 546. Justice Blackmun further emphasized this theme:

⁹ N.Y. Times, Dec. 25, 1986, at 11, col. 1 (city ed.); Time, Jan. 12, 1987, at 35, col. 4.

"The science of government ... is the science of experiment," *Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L. Ed. 242 (1821), and the States cannot serve as laboratories for social and economic experiment, *see New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 386, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry

Id. As is evidenced by the foregoing, legislative diversity is not an evil to be eradicated. Rather, experimentation by the States is an essential, pragmatic element of "Our Federalism," *Younger v. Harris*, 401 U.S. 37, 45 (1971), through which novel solutions to problems are identified and instituted.

CONCLUSION

Therefore, this Court should reverse the decision of the Eighth Circuit Court of Appeals and declare that 23 U.S.C. § 158 is unconstitutional.

Respectfully Submitted,

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APPENDIX

APPENDIX A

ESTIMATED LOSSES OF HIGHWAY FUNDS
OCCASIONED BY 23 U.S.C. § 158
(in millions of dollars)

	Fiscal Year 1987	Fiscal Year 1988
Colorado	\$9.1M	\$18.2M
Hawaii	5.9	11.8
Ohio	15.0	30.0
Vermont	2.6	5.3
Wyoming	4.5	9.0

APPENDIX B

STATUTES AT LARGE OF SOUTH CAROLINA
General and Permanent Laws 1985

No. 117

(R171, H2261)

AN ACT TO AMEND SECTIONS 61-9-40, AS AMENDED, 61-9-455, AND 20-7-370, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO BEER AND WINE, SO AS TO PROVIDE THAT THE SALE OF BEER AND WINE TO PERSONS UNDER THE AGE OF TWENTY-ONE AND THE PURCHASE OR POSSESSION OF THE BEVERAGES BY A PERSON UNDER THE AGE OF TWENTY-ONE IS UNLAWFUL; AND TO PROVIDE THAT SIGNS IN RETAIL LOCATIONS MUST BE POSTED STATING THAT PURCHASE OF BEER AND WINE BY PERSONS UNDER TWENTY-ONE YEARS OF AGE IS UNLAWFUL.

Be it enacted by the General Assembly of the State of South Carolina:

Penalty

SECTION 1. Section 61-9-40 of the 1976 Code, as last amended by Act 414 of 1984, is amended to read:

"Section 61-9-40. It is unlawful for any person to sell beer, ale, porter, wine, or any other similar malt or fermented beverage to a person under the age of twenty-one. Any person making such unlawful sale must be upon conviction fined not less than one hundred dollars nor more than two hundred dollars or imprisoned not less than thirty days nor more than sixty days, or both, in the discretion of the court."

Permit to be posted

SECTION 2. Section 61-9-455 of the 1976 Code, added by Act 414 of 1984, is amended to read:

"Section 61-9-455. Every person engaged in the business of selling at retail beer, ale, porter, or wine shall post in every location for which he has obtained a permit pursuant to Section 61-9-310 a sign with the following words printed thereon: 'Any purchase of beer, ale, porter, or wine in this establishment by anyone under twenty-one years of age is a violation of the laws of this State and may be punished accordingly.' The Alcoholic Beverage Control Commission shall by regulation prescribe the size of the lettering and the location of the sign on the seller's premises.

Any retail seller of beer, ale, porter, or wine who fails to display this section is guilty of a misdemeanor and upon conviction must be fined not more than one hundred dollars or imprisoned for not more than thirty days."

Penalty

SECTION 3. Section 20-7-370 of the 1976 Code, as last amended by Act 506 of 1984, is further amended to read:

"Section 20-7-370. It is unlawful for any person under the age of twenty-one to purchase, or knowingly have in his possession, any beer, ale, porter, wine, or any other similar malt or fermented beverage. Any such possession is prima facie evidence that it was knowingly possessed. Any person violating the provisions of this section is guilty of a misdemeanor and upon conviction must be fined not less than twenty-five dollars nor more than one hundred dollars.

This section does not apply to any employee lawfully engaged in the sale or delivery of any such beverage in an unopened container.

Persons eighteen years of age and over lawfully employed to serve or remove beer, wine, or alcoholic beverages in establishments licensed to sell such beverages are not considered to be in unlawful possession of the beverages during the course and scope of their duties as an employee. The provisions of this paragraph shall in no way affect the requirement that a bartender must be at least twenty-five years of age."

Effect of code sections if declared unconstitutional

SECTION 4. If Public Law 98-363 is enjoined by a court of competent jurisdiction or declared by a court to be contrary to the United States Constitution, the provisions of sections 61-9-40, 61-9-455, and 20-7-370 of the 1976 Code shall be effective under the terms and conditions as existed prior to the amendments contained in Sections 1, 2, and 3.

Time effective

SECTION 5. This act shall take effect September 14, 1986.

Approved the 24th day of May, 1985.

INTRODUCED
March 19, 1985

S. 364

Introduced by SENATORS Pope and Powell

S. Printed 3/19/85—S.
Read the first time March 19, 1985.

A CONCURRENT RESOLUTION

TO REQUEST THE ATTORNEY GENERAL OF SOUTH CAROLINA TO FILE AN AMICUS CURIAE BRIEF SUPPORTING THE POSITION OF THE STATE OF SOUTH DAKOTA IN THE CASE OF *SOUTH DAKOTA V. DOLE* CONCERNING THE FEDERAL MANDATE TO STATES TO RAISE THE DRINKING AGE TO TWENTY-ONE YEARS OF AGE IN ORDER TO PREVENT THE FORFEITURE OF FEDERAL HIGHWAY FUNDS.

Whereas, the members of the General Assembly believe it is the duty of the State of South Carolina to participate where possible in those federal cases which have a significant impact upon the states in general and the State of South Carolina in particular; and

Whereas, the case of *South Dakota v. Dole* where the Congress has required the states to raise the drinking age to twenty-one years of age or lose federal highway funds is such a case. Now, therefore;

Be it resolved by the Senate, the House of Representatives concurring:

That the members of the General Assembly hereby request the Attorney General of South Carolina to file an Amicus Curiae brief supporting the position of the State of South Dakota with Judge Andrew W. Bogue in the case of *South Dakota v. Dole*, Docket NO. CIV. 84-5137, concerning the federal mandate to states to raise the drinking age to twenty-one years of age in order to prevent the forfeiture of federal highway funds.

Be it further resolved that a copy of this resolution be forwarded to the Attorney General.

**LAWS OF VERMONT
1986**

**NO. R-69. JOINT RESOLUTION RELATING TO
FEDERAL LEGISLATION ON THE DRINKING AGE.**

(J.R.H. 16)

Offered by: Representatives Harris of Windsor and Spater of Chester.

WHEREAS, The President of the United States has proposed and the Congress has enacted a "National Minimum Drinking Age" of 21 years (23 U.S.C. § 158); and

WHEREAS, under the federal legislation, the Secretary of Transportation of the United States must withhold a significant portion of federal highway funds from each state beginning October 1, 1986 unless said state has adopted a minimum drinking age of 21 years, and

WHEREAS, the Twenty-First Amendment of the United States Constitution preserves exclusively for the states the power to regulate the sale of intoxicating liquors within their borders, and

WHEREAS, the United States Constitution does not grant to the federal government the specific power to establish a drinking age and all powers not given to the United States Government are reserved to the states, and

WHEREAS, the Vermont Legislature has during the present term debated the bill to raise Vermont's minimum drinking age to 21, and said debate has been substantially affected by the presence of the federal legislation, particularly among those Senators and Representatives who are concerned about the threatened loss of federal funds or who resent the interference by Congress in a manner which is a state prerogative, and

WHEREAS, the State of South Dakota is currently challenging the constitutionality of the federal law, now therefore be it

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES:

That the General Assembly expresses on behalf of the people of the State of Vermont its outrage and opposition to very intrusive actions by the federal government on the drinking age, and be it further

RESOLVED: That the Attorney General of the State of Vermont be directed to join suit with South Dakota in challenging this law, and be it further

RESOLVED: That the Secretary of State be directed to send a copy of this resolution to the Vermont Congressional Delegation with a request that the delegation seek the repeal of the "National Minimum Drinking Age" as soon as possible, and be it further

RESOLVED: That the General Assembly requests the Congressional Delegation to convey the resolution and the request for repeal of the "National Minimum Drinking Age" to the President of the United States.

APPENDIX C

PROPOSED CONSTITUTIONAL AMENDMENT

To amend Article XV by adding a new Section 11 of the
Constitution of the State of Ohio.

(Proposed by Initiative Petition)

PRESENT OHIO LAW PROHIBITS PERSONS UNDER TWENTY-
ONE FROM PURCHASING OR CONSUMING ANY INTOXI-
CATING LIQUOR. THE PRESENT LAW ALSO PROHIBITS
PERSONS UNDER NINETEEN FROM PURCHASING OR
CONSUMING BEER.

THIS PROPOSED AMENDMENT WOULD:

1. PROHIBIT ANYONE UNDER AGE 21 FROM CON-
SUMING OR POSSESSING ANY ALCOHOLIC BEVER-
AGES.
2. PROHIBIT ANYONE FROM FURNISHING ALCOHOLIC
BEVERAGES TO ANYONE UNDER AGE 21.
3. INVALIDATE THE PRESENT STATUTORY LAW WHICH
ALLOWS A PARENT OR LEGAL GUARDIAN TO FUR-
NISH ALCOHOLIC BEVERAGES TO A PERSON UNDER
21 YEARS.
4. DEFINE ALCOHOLIC BEVERAGE AS ANY BEVERAGE
CONTAINING $\frac{1}{2}$ OF 1% OR MORE ALCOHOL BY
WEIGHT.
5. NOT APPLY TO SACRAMENTAL OR MEDICAL CON-
SUMPTION.
6. REQUIRE THE GENERAL ASSEMBLY TO PASS LAWS
IMPOSING PENALTIES FOR VIOLATING THESE
SECTIONS.

ELECTION RESULT, NOVEMBER 8, 1983:

FOR: 1,386,959 AGAINST: 1,967,129

AMICUS CURIAE

BRIEF

12
No. 86-260

Supreme Court, U.S.

~~FILED~~

MAR 12 1987

ROBERT H. NIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF SOUTH DAKOTA,

Petitioner,

v.

ELIZABETH H. DOLE,
SECRETARY OF TRANSPORTATION,

Respondent.

ON WRIT OF CERTIORARI TO THE U.S. COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE
NATIONAL SAFETY COUNCIL
IN SUPPORT OF RESPONDENT

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Counsel for Amicus Curiae

March 10, 1987

QUESTION PRESENTED

Whether Congress may constitutionally enact a national life-saving plan to cope with a nationwide epidemic of drunk driving by people under 21 years of age, through conditioning receipt by States of portions of Federal Highway construction grants upon their enacting 21-year minimum age drinking laws.

TABLE OF CONTENTS

	Page
Question Presented.....	i
Table of Contents.....	ii
Table of Authorities	iii
Brief <i>Amicus</i> of the National Safety Council.....	1
Interest of <i>Amicus Curiae</i>	1
Summary of Argument.....	2
Argument:	
Case Is Not Ripe for Judicial Determination	3
Drunk Driving Is A Dangerous National Epidemic.....	5
A. All Constitutional Provisions Have Equal Validity.....	10
B. Twenty-First Amendment and Congress's Spending Power.....	12
Twenty-First Amendment and Congress' Spending Power.....	12
Federal Statute Does Not Violate Tenth Amendment.....	14
Balancing Constitutional Provisions	16
The Constitution Is A Living Document.....	21
Conclusion.....	26

TABLE OF AUTHORITIES

Cases:	Page
<i>Allied Structural Steel Co. v. Spannious</i> , 438 U.S. 234 (1978)	21
<i>Appalachian Coal Inc. v. U.S.</i> , 288 U.S. 344 (1933)	21
<i>Atchison etc. Ry Co. v. U.S.</i> , 284 U.S. 248 (1932)	21
<i>Babbitt v. United Farm Workers National Union</i> , 419 U.S. 289 (1979)	3
<i>Bates v. Little Rock</i> , 361 U.S. 516 (1960)	17
<i>Battipaglia v. N.Y. State Liquor Authority</i> , 745 F.2d 166 (2d Cir. 1984), cert. denied 105 S. Ct. 1393 (1985)	10
<i>Bicklin v. Board of Education</i> , 333 F.Supp. 902 (D.C. N.Y. 1971), aff'd. 406 U.S. 951 (1972)	17
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<i>Hodel v. Virginia Surface Mining & Reclam. Assn.</i> , 452 U.S. 264 (1981)	3
<i>Holy Spirit Assn. v. Town of New Castle</i> , 480 F.Supp. 1212 (S.D. N.Y. 1979)	17
<i>Hostetter v. Idlewild Liquor Corp.</i> , 377 U.S. 324 (1964)	10, 11
<i>Houser v. State of Washington</i> , 85 Wash.2d 803 (Sup. Ct. Wash. 1975)	26
<i>Ivanhoe Irr. Dist. v. McCracken</i> , 357 U.S. 275 (1958)	15
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<i>Larkin v. Grendel's Den, Inc.</i> , 459 U.S. 116 (1982)	11
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<i>North Carolina v. Secretary of Health, Education and Welfare</i> , 445 F.Supp. 532 (D.C. N.C. 1977), <i>aff'd</i> , 435 U.S. 127 (1978)	14
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<i>Socialist Labor Party v. Gilligan</i> , 406 U.S. 583 (1972)	4
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Constitution and Statutes:

Constitution of the United States:

Art. I:

Sec. 8

Cl. 1 Spending Clause	12, 16
Cl. 3 Commerce Clause	10, 11, 19
Cl. 4 Bankruptcy Clause	11

Bill of Rights	11, 12, 17
Amend. X	<i>Passim</i>
Amend. XXI	<i>Passim</i>
23 U.S.C. 158	5, 12, 18
36 U.S.C. 463 (1) and (5)	1
26 U.S.C. 209, Sherman Act	11
42 U.S.C. 7410 (1) (1) Clean Air Act	19
42 U.S.C. 6000, Developmentally Disabled and Bill of Rights Act, National Health Planning and Resources Development Act ...	12, 13, 15

Miscellaneous:

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Sweedler, Barry	7
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<i>Health United States—1985</i>	7
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF SOUTH DAKOTA,

Petitioner,

v.

ELIZABETH H. DOLE,
SECRETARY OF TRANSPORTATION,

Respondent.

ON WRIT OF CERTIORARI TO THE U.S. COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE
NATIONAL SAFETY COUNCIL*

INTEREST OF *AMICUS CURIAE*

The National Safety Council is a non-governmental, not-for-profit corporation chartered by the Congress of the United States to promote "the national safety," including safety "on the streets and highways" among other places, 36 U.S.C. 463(1) and (5).

The National Safety Council's Congressionally-authorized safety interests cover all segments of American society in all spheres of activity, including industry, labor, transportation, agriculture, and State and local agencies. In the field of traffic safety, in particular, the Council's Committee on Alcohol and Other Drugs, a multi-disciplinary expert body, has been a pioneer since 1936. Much of the model alcohol legislation appearing in the Uniform Vehicle Code was developed by the recommendations of this Committee.

*Consents from the parties to the filing of this brief *amicus curiae* are on file with the Clerk of the Court.

The Council's President was a member of President Reagan's Presidential Commission on Drunk Driving, and the Council initially housed the follow-up non-governmental National Commission Against Drunk Driving.

As the hub of the voluntary safety movement, the National Safety Council has pledged itself to a long-term effort to cope with the tragedy of drunk driving. The Council believes that the Federal 21-year minimum drinking-age law is a vital part of a comprehensive national program designed to prevent thousands of deaths and injuries and enormous unnecessary costs annually caused through drunk driving by people below 21 years of age.

SUMMARY OF ARGUMENT

As a threshold issue, this case is not ripe for judicial determination because there is no factual predicate relative to the applicability of the Twenty-First Amendment which is the gravamen of appellant's complaint.

The Twenty-First Amendment bars Federal actions dealing with "the transportation or importation of intoxicating liquors into any state. . . ." There is absolutely no evidence in the record, since the case was decided on a motion to dismiss the complaint without trial, whether or not there was any transportation or importation here. Therefore the case is not ripe for judicial determination and should be dismissed on that basis.

If the Court does not dismiss the appeal, it should affirm the decision of the Court of Appeals. Drunk driving is a nationwide epidemic and a dangerous public health crisis affecting all 50 States. Congress acted on the basis of evidence that a gross overrepresentation of fatalities, injuries and property damage were associated with drunk driving by persons under 21 years of age.

The Federal 21-year minimum age for drinking statute does not violate either the Tenth Amendment or the Twenty-First Amendment. The Constitution is a single instrument all of whose provisions are of equal validity. In the statute under review, Congress exercised its independent spending power (the general welfare clause) to induce States to enact similar statutes in order

that they not lose part of their Federal highway construction grants. No State is compelled to enact such laws because it may freely reject the Federal inducement. This Court has ruled that the Federal Government may constitutionally attach conditions to States' receipt of Federal funds.

The Court's criteria for balancing constitutional provisions require a balancing in favor of the national government in this case because of the compelling life-saving purposes of the Federal statute. The Constitution is a living document which is flexible, through interpretation by judicial review, to provide for the illimitable future contingencies as they may happen.

CASE IS NOT RIPE FOR JUDICIAL DETERMINATION

As a threshold issue, this case is not ripe for judicial determination. The District Court dismissed the complaint without a trial, and the Court of Appeals affirmed on that basis.

This Court has invariably followed the constitutional principle ~~that~~ "adjudication might be postponed until 'a better factual record might be available'." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 300 (1979) quoting *Regional Rail Reorganization Cases*, 419 U.S. 102, 143 (1943). *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 294-5 and n.36 (1981) stated that "the constitutionality of statutes ought not to be decided except on an actual factual setting that makes such a decision necessary."

In *Rescue Army v. Municipal Court*, 331 U.S. 549, 575 (1947) this Court stated constitutional issues should be avoided which "come to us in highly abstract form." And in *Liverpool, N. Y. and Phil. S.S. Co. v. Commissioners of Emigration* (1885), the Court stated the constitutional principle "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied," 113 U.S. 33, 39 (1885). Speaking for a majority of the Court, Justice Rehnquist dismissed an appeal from a three-judge court's ruling holding a state statute to be unconstitutional because "the record before the three-judge District Court, and now before this Court, is extraordinary skimpy of the sort of proved or admitted facts that would enable

us to adjudicate this claim," *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 587 (1972). "... Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of this Court's jurisdiction even though that jurisdiction is technically present", p. 588.

The Twenty-First Amendment, which is the gravamen of Petitioner's complaint, so far as here relevant reads:

"The transportation or importation into any state, for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

On its face, the Amendment relates to transportation or importation of intoxicating liquors. By misreading the Amendment, through a specious argument about the "core" of the Amendment (Brief, pp. 41, 61), Petitioner tries to bootstrap a question not properly before the Court.¹

This Court has already rejected arguments based on the alleged intention of persons who spoke on the Amendment during the process of Congressional consideration, saying:

"In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it."²

Even the Petitioner urges the Court not to go beyond the pleadings (Brief, p. 24).

The record before the Court is utterly barren of any factual predicate which would enable this Court to determine whether there has been any "transportation or importation" into South

¹"... There is no constitutional right to buy or possess alcohol liquor," *Dunagen v. City of Oxford, Miss.*, 489 F.Supp. 763, 772 n.11 (D.C. Miss., 1980), *aff'd*, 718 F.2d 738 (5th Cir. 1983), *cert. denied* 82 L.Ed.2d 855 (1984); *Felix v. Milliken*, 463 F.Supp. 1360, 1372 (D.C. Mich. 1978) (any such right was "explicitly or implicitly" denied by the Twenty-First Amendment); *Harrison v. State of Alaska*, 687 Pac.2d 332, 339, n.6 (Court of App. Alaska, 1984).

²*California Liquor Dealers v. Medcal Aluminum Inc.*, 445 U.S. 97, 106-7, and footnotes 10, etc. (1980).

Dakota. Without such a factual record, the matter is not ripe for judicial determination and it is premature to consider whether judicial determination is relevant to the instant case.³

Measured by this Court's applicable standards, therefore, the present case should be dismissed for lack of ripeness.

DRUNK DRIVING IS A DANGEROUS NATIONAL EPIDEMIC

Drunk driving is a dangerous public health crisis, a nationwide epidemic menacing people in all 50 states.

In 1982, President Reagan appointed a Presidential Commission on Drunk Driving chaired by former Massachusetts Governor and U.S. Secretary of Transportation John A. Volpe. The vice chairman was Frank F. White, former Governor of Arkansas. The Commission's final report (Nov. 1983) stated:

"At least 50% of all highway accidents involve the irresponsible use of alcohol. Over the past 10 years, 250,000 Americans have tragically lost their lives in alcohol-related crashes. Conservative estimates place the annual economic loss at \$21 billion, while others run as high as \$24 billion", p. 1.

The Commission recommended, among other things:

"Legislation at the Federal level should be enacted providing that each State enact and/or maintain a law requiring 21 years as the minimum age for purchasing and possessing all alcoholic beverages. The legislation should provide that the Secretary of Transportation disapprove any project under Section 106 of the Federal Highway Act (Title 23, United States Code) for any state not having and enforcing such a law," p. 10.

In 1986, the National Institute on Alcohol Abuse and Alcoholism stated:

³On Jan. 12, 1987, this Court granted Petitioner's motion to dispense with printing the Joint Appendix.

"Drinking-and-driving accidents are the number one killer of teenagers in the United States. Thousands died last year, thousands will die this year. It can happen to your friends. It can even happen to you." *Think. You Don't Have to Drink*, p. 5.

In 1985, the first joint publication of the National Highway Traffic Safety Administration and the National Institute on Alcohol Abuse and Alcoholism stated:

"The leading cause of death among young aged 16 to 24 is alcohol-related motor vehicle accidents. The Surgeon General of the U.S. Public Health Service has indicated that while life expectancy has increased for members of other age groups, it has decreased for youth—mainly because of alcohol-impaired driving fatalities," *Shifting Into Action: Youth and Highway Safety*, p. 2.

"Although young people make up only 10 percent of the driver population and account for only 6 percent of the vehicle miles traveled in this country, they represent 17 percent of all drivers involved in accidents, and 16 percent of all alcohol-impaired drivers in accidents," *Ibid.*, p. 2.

In 1982, the National Institute on Alcohol Abuse and Alcoholism published *Alcohol and Health, Monograph No. 4* which included the following statement:

"No other singular source of mortality approaches traffic accidents among youth in terms of sheer numbers, and no other cause of death is as predictably associated as traffic accidents with a single known contributing factor—namely, the interaction of beverage alcohol and a young driver's ability to control an automobile . . .", pp. 198-9.

"Virtually every major study in the area identifies youth as being overrepresented in alcohol-related traffic crashes . . . Young people between 16 and 24 are involved in more fatal, injury-producing and property damage crashes, and more crashes in which alcohol was involved, in a higher proportion than even their high exposure would suggest, than old drivers." p. 200.

The U.S. Public Health Service outlined, in a major report, risks to the national health:

" . . . Alcohol-related accidents are the leading cause of death for those 15-21 years of age, and 60% of all alcohol-related traffic fatalities are among this age group . . .", *Health United States—1980*, p. 32. (See also pp. 33, 368.)

In *Health U.S.—1985*, the U.S. Public Health Service reported that for 1984 the death rate for motor vehicle accidents for people age 15-24 was 36.5 per 100,000 deaths—the highest rate for any age group. The report indicated a rate of 57.0 for white males and 28.3 for black males, p. 58. And in late 1986, the U.S. Public Health Service issued a report which stated:

"Motor vehicles kill more people and lead to more disabling injuries than any other cause . . . Alcohol use and drunk driving continue to pose a serious problem, with more than one quarter of a million persons having been killed in an alcohol-related crash over the past decade . . .", *The 1990 Health Objectives for the Nation: A Midcourse Review*, pp. 128-9 (Nov. 1986).

The National Transportation Safety Board, a specialized Federal agency, stated:

"We were particularly concerned about the problem of youth in traffic accidents, since about 20% of all fatal accidents involved drivers under the age of 21, while less than 10 percent of licensed drivers are in this age group . . .", B. Sweedler, National Research Council, *Toward Prevention of Alcohol Problems* (1984), p. 130. ". . . we felt that about 1,250 lives, most of them young ones, could be saved each year if each state raised its drinking age to 21 . . .", p. 131.

The Gallup Poll showed that 77% of the American population supports legislation to raise the drinking age to 21, *ibid.* p. 131.

According to the National Safety Council's *Accident Facts—1986 Edition*, drunk driving was a factor in 50 to 55% of fatal motor vehicle accidents, p. 52.

The National Committee on Marihuana and Drug Abuse issued a report in 1973, "Drug Abuse in America: Problem in Perspective," which said that alcohol is "a contributing factor in a major fraction of all traffic accidents and fatalities," p. 184.

Diversity of state laws on the legal drinking age invites teenagers in states with a 21-year-old drinking law to drive into neighboring states where the legal age is lower, and driving—usually during late night hours—home after drinking. Many are in no condition to drive because of impaired judgment and impaired reaction times. By inviting young people to get drunk in South Dakota, Petitioner consciously imposes its standards on bordering States that have responsibly sought to protect their own people against the drunk driving epidemic. In demanding State's Rights for itself Petitioner usurps the State's Rights of bordering States.

In the early 1970s, 29 states lowered the minimum legal age for the purchase and drinking of alcoholic beverages. However, as a result of accumulating evidence that linked the lowered legal drinking age with alcohol-related health problems, and more importantly with increased motor vehicle accidents by young drivers, 33 states raised the minimum legal drinking age since 1976, 30 of those to age 21. Currently a total of 44 states plus the District of Columbia has enacted a 21-year-old minimum drinking age law.

The four most recent and comprehensive studies concerned with the effects of raising the minimum drinking age in alcohol involvement in motor vehicle accidents were done by the National Center for Statistics and Analysis, the Insurance Institute for Highway Safety, the National Safety Council and the N.Y. State Department of Motor Vehicles. Based upon an analysis of thirteen states for the period 1975-1982, the National Center concluded that raising the legal minimum ages for 18, 19 and 20 year olds produced an estimated reduction of about 13% in annual driver involvements in fatal accidents per licensed driver affected by the law changes.

A December 1985 study by the Insurance Institute for Highway Safety, "Raising the Alcohol Purchase Age: Its Effect on Fatal Motor Vehicle Crashes in 26 States," also found a 13% reduction in fatal crash involvement among youthful drivers

affected by changes in the drinking age. This study indicated that the substantial reductions in fatal crashes occur as a result of the law's change and that the reductions that occur during initial years are undiminished over time.

The National Safety Council's study shows that:

"Raising the legal minimum drinking age in 10 states reduced the fatal motor-vehicle accident involvement rate of licensed drivers affected by the law changes. The ratio of single-vehicle nighttime fatalities per 1,000 licensed drivers decreased significantly among drivers in the age group affected by the law, whereas no significant change in the ratio was found in a comparison group aged 25 to 29 years. Further, the before-after changes in ratios for drivers in the affected age group was significantly greater than the changes for drivers in the comparison group. The single-vehicle nighttime fatal crash involvement rate of drivers affected by the law change decreased an average of 21% in the 10 states."

The National Safety Council concluded as a result of this study:

"Thus, increasing the legal drinking age appears to have been effective in reducing fatal accident involvements among those affected by the law." Alan F. Hoskin, etc., "The Effect of Raising the Legal Minimum Drinking Age on Fatal Crashes in 10 States," 17 *Journal of Safety Research* 117, 120 (Fall 1986)

N.Y. State's Motor Vehicle Department revealed that alcohol-related accidents involving under-21 drivers declined by nearly half and fatalities by over 40%. These declines were six times greater than for over-21 year drivers. *N.Y. Times*, Dec. 12, 1986, p. B 1.

As President Reagan said when he received the report of his Presidential Commission on Drunk Driving:

"Drunk driving is a national menace, a national tragedy, and a national disgrace."

FEDERAL STATUTE DOES NOT VIOLATE TWENTY-FIRST AMENDMENT

Even if the Court should decide not to dismiss the appeal, as here respectfully proposed, it should affirm the Court of Appeals because the Federal statute under review does not violate the Twenty-First Amendment.

A. ALL CONSTITUTIONAL PROVISIONS HAVE EQUAL VALIDITY

A whole line of cases of this Court hold that the Constitution is "... one instrument, all of whose provisions are to be deemed of equal validity," *Prout v. Starr*, 188 U.S. 537, 543 (1903).

For the Court Justice Stewart wrote in another case:

"Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like all other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."⁴

"The Twenty-First Amendment does not repeal the Commerce Clause"; there must be "accommodation" of the Twenty-First Amendment with the Commerce Clause.⁵

Very recently this Court said that the Twenty-First Amendment "does not license the States to ignore their obligations under other provisions of the Constitution."⁶

⁴ *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964).

⁵ *Ibid.*, pp. 331-2. See also *Battipaglia v. N.Y. State Liquor Authority*, 745 F.2d 166, 169 n.4 (2d Cir. 1984), cert. denied 105 S.Ct. 1393 (1986).

⁶ *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691, 712 (1984). (Citations included in opinion are not set forth here.)

This Court has also stated:

"The State may not exercise its power under the Twenty-First Amendment in a way that impinges upon the Establishment Clause of the First Amendment."⁷

Even the most precise Congressional authority under the Constitution, such as the bankruptcy power, is subject to the Bill of Rights in the Constitution.⁸ The Court there also cited, in similar vein, other Court decisions on the war power, the taxing power, power to regulate commerce, and power to exclude aliens.

In January, this Court held that the Twenty-First Amendment does not prevent Congress from enacting the Sherman Act under the Commerce Clause, *324 Liquor Corporation v. Duffy*, 55 L.W. 4094 (Jan. 13, 1987). Justice Powell rejected the argument that New York State's liquor pricing regulation was insulated against Federal anti-trust sanctions. This Court stated that the power granted to the States by the Twenty-First Amendment cannot overcome conflicting Federal policies, if on the facts of the case they outweigh the State's interest involved.⁹

Petitioner candidly, states that it does not accept a recent Supreme Court ruling on the relation of the Commerce Clause to State action.¹⁰

If ever a case presented facts in which the Federal policies outweighed the State's interest it is this one: saying thousands of lives and preventing millions of injuries in traffic accidents.

⁷ *Larkin v. Grendel's Den, Inc.* 459 U.S. 116, 122 n.5 (1982).

⁸ *Louisville Joint State Land Bank v. Radford*, 295 U.S. 555, 589 (1935). See also Corwin, *The Constitution* (1953), p. 263. Cf: *Seagram & Sons v. Hostetter*, 384 U.S. 45, 46 (1966), where this Court said: "Nothing in the Twenty-First Amendment of course would prevent enforcement of the Sherman act against conspiracy."

⁹ See *California Liquor Dealers v. Medcal Aluminum, Inc.*, 445 U.S. 97, 114 (1980) ("... the Twenty-First Amendment provides no shelter for the violation of the Sherman Act ..."). It does not repeal the commerce clause.) See also *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332-3 (1964); *Dunagen v. City of Oxford, Miss.*, 489 F.Supp. 763, 772 (D.C. Miss. 1980), aff'd. 718 F.2d 738 (5th Cir. 1983), cert. denied 82 L.Ed.2d 855 (1984); *Seagram and Sons v. Hostetter*, 384 U.S. 45 (1966).

¹⁰ Brief, pp. 64-5.

B. THE TWENTY-FIRST AMENDMENT AND CONGRESS' SPENDING POWER

Basing its action on the Constitutional grant of spending power (otherwise known as the "general welfare" clause, Constitution, ART. I, Section VIII, clause 1), Congress authorized the Secretary of Transportation to withhold 5% to 10% of the Federal grant of highway construction funds to the States that did not adopt state laws establishing a 21-year minimum age for drinking. South Dakota and five other States have failed to comply, while the rest of the States have.

This federal statute does not compel States to enact such a statute but merely established incentives for them to prevent the lapsing of part of their apportioned Federal road construction grants, 23 U.S.C. 158 (a) and (b) (4).

An earlier South Dakota case is relevant here. There is

"... a vast difference between *requiring* a state to adopt certain regulations and denying funding to a state that refuses to adopt them."¹¹

This Court has stated:

"Valid federal enactments may have an effect on state policy—and may, indeed, be designed to induce state actions in areas that otherwise would be beyond Congress' regulatory authority."¹²

This Court's most recent statement on this subject was by Justice Rehnquist in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), where the Court dealt with the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.* which set conditions on Federal grants:

¹¹ *State of South Dakota v. Adams*, 506 F.Supp. 50, 57 (D.C. S.D. 1980), *aff'd*, on Dist. Court's opinion, 635 F.2d 698 (8th Cir. 1980), *cert. denied* 451 U.S. 984 (1981).

¹² *EEOC v. Mississippi*, 456 U.S. 742, 746 (1982). See also *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143-4 (1947).

"... our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States," p. 12;

"Like other federal-state cooperative programs, the act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding," p. 11.

The Federal act under review in the instant case is purely voluntary so far as the States are concerned. There is no invasion of sovereignty, as the Court of Appeals properly stated, for the following reasons:

1) "Further, South Dakota can hardly claim either a vested right in the federal funds being offered or the right to set the conditions on which the money will be provided."

2) "... South Dakota is entirely free to reject Congress' offer of federal highway funds and exercise in any way it chooses its authority to establish a minimum drinking age."

South Dakota claims that the Federal Government usurped its alleged authority under the Twenty-First Amendment. (Brief, pp. 39, 71) Instead, South Dakota seeks to usurp the Federal Government's authority under its constitutional spending power. The Court of Appeals was correct in this case when it stated:

"Congress' power under the spending clause is a separate and distinct grant of authority... That power, when viewed in connection with the necessary and proper clause, is quite extensive, *Buckley v. Valeo*, 424 U.S. at 90, and without question includes the authority to attach conditions to the receipt and further expenditure of federal funds, see *Fullilove v. Klutznick*, 448 U.S. at 474 (opinion by Burger, Ch. J.) citing cases that uphold Congress's placement of conditions on the receipt of federal funds," 791 F.2d 628, 631 (1986).

It is not necessary for the Court to explore, under this Record, all the permutations and combinations of relationships between the Twenty-First Amendment and other applicable provisions of the Constitution. As Chief Justice Burger stated in *Fullilove v. Klutznik*, 448 U.S. 448, 475 (1980):

"Here we need not explore the outermost limitations on the objectives obtainable through such an application of Spending Power."

Therefore, the decision of the Court of Appeals should be affirmed on the ground of the Federal Government's constitutional spending power.

TENTH AMENDMENT IS NOT VIOLATED

Neither the Tenth Amendment nor the concept of Federalism is violated when the Federal Government exercises its constitutional spending power to establish conditions upon which States may receive Federal grants.

This Court has ruled that, notwithstanding the Tenth Amendment, Congress has the "power to fix the terms upon which its money allotments to the States shall be disbursed," *Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127, 143 (1947). To the same effect, see *North Carolina v. Secretary of Health, Education and Welfare*, 445 Fed. Supp. 532, 535 (E.D. N.C. 1977), *affirmed* 435 U.S. 962 (1978) where the condition in a health planning act was an amendment of the State's Constitution.

More recently, Chief Justice Burger stated for the Court that Congress can

"... further broad policy objectives by conditioning receipt of Federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy," *Fullilove v. Klutznik*, 448 U.S. 448, at 474 (1980).

The former Chief Justice's description of Federal grants with conditions as "inducements . . . to cooperate voluntarily with federal policy" has a long history. In the very first case considered by this Court on Congress' authority to make grants, the Court stated:

"... the powers of the states are not invaded, since the statute imposes no obligation, but simply extends an option which the state is free to accept or reject," *Massachusetts v. Mellen*, 262 U.S. 447, 480 (1923).

In *Rosada v. Wyman*, 397 U.S. 413 (1970), the Court referred to "incentive."

This Court and the lower federal courts have consistently upheld the constitutionality of using Federal grant programs to induce State cooperation with Federal policies. This Court said:

"Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges," *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295 (1958).

In *Florida Dept. of Health v. Califano*, 449 F.Supp. 274, 284 (N.D. Fla. 1978), *affirmed* 585 F.2d 150 (5th Cir. 1978), *cert. denied* 441 U.S. 93 (1979), the District Court referred to "inducement," and said:

"... any state which objects to the 'strings' attached to the receipt of federal funds has the option to refuse both the grants-in-aid and the objectionable conditions."

Goodin v. State, 436 F.Supp. 553, 586 (W.D. Okla. 1977; three-judge court) held in passing on the National Health Planning and Resources Development Act of 1974:

"It is also well settled that the Federal government may impose terms and conditions upon which its money allotments to the States shall be disbursed. . . This requirement is not mandatory. It is not arbitrary. A State can take it or leave it. . ."

And in *Texas Landowner Rights Ass'n v. Harris* [Secretary of Housing and Urban Development], 453 F.Supp. 1025 (D.C. Cir. 1978) *aff'd*, 598 F.2d 311 (D.C. Cir. 1979), *cert. denied* 444 U.S. 927 (1979) the Court referred to

"... a statutory condition which is not mandatory but is left in the hands of the State," p. 1031.

The Petitioner asks the Court to ignore or reverse this consistent and frequently affirmed pattern of rulings of the Court, on the ground that the State cannot afford to forego the Federal grant of funds because of the State's "practical financial needs" (Brief, p. 53). There is no basis in the Court's precedents for such request nor rational reason for adopting it.

The status of the constitutional spending power and the Tenth Amendment is analytically summarized in an American Bar Association treatise on the subject:

"It would appear that the use of grant programs as an instrument of national policy has become too pervasive and too widespread for an argument to be made that any exercise of the Congress' power under the taxing and spending power, short of virtual Federal usurpation of state power by the Congress, would be overturned by the Supreme Court under the Tenth Amendment," Madden, T.J. "The Constitutional and Legal Foundations of Federal Grants," Ch. III, FEDERAL GRANT LAW (ed. M. Mason, 1982, ABA), p. 25.

BALANCING CONSTITUTIONAL PROVISIONS

This Court has often faced the delicate task of balancing conflicting constitutional provisions. Here we have just such a case, the need to balance the State's claim under the Twenty-First and Tenth Amendments with the Federal Government's claim under the Constitutional Spending Power.

"Cases such as this one inevitably call for a delicate balancing of important but conflicting interest," said Justice White in a different context. *State of Wisconsin v. Yoder et al.*, 406 U.S. 205, 237 (1972) (concurring). In "balancing" the conflicting interests

involved, it is sufficient for this Court to rule that *under the circumstances of this particular case*, the respondent Secretary of Transportation has acted within her rights. It is not necessary to reach any other question on the relationship of the Twenty-First or the Tenth Amendments with other circumstances.

This Court ruled that the limitation of even the First Amendment freedoms can be justified by

"... a sufficiently important governmental interest . . .",
U.S. v. O'Brien, 391 U.S. 367, 376 (1968) (per Warren, Ch. J.)

See also *Theriault v. Carlson*, 495 Fed.2d 390 (5th Cir. 1974), *reh. in banc denied*.

What is "sufficiently important"? This Court has used various descriptions of the required quality of federal governmental interest in the Court's balancing function: "compelling,"¹³ "substantial,"¹⁴ "subordinating,"¹⁵ "paramount,"¹⁶ "cogent,"¹⁷ and "strong."¹⁸ Other descriptions are: "highest order,"¹⁹ "important societal interest"²⁰ and "public safety health and welfare."²¹

¹³ *NAACP v. Button*, 371 U.S. 415, 438, 444 (1963); *Sherbert v. Verner*, 371 U.S. 398, 403, 407 (1963). See also *Biklin v. Board of Education*, 333 F.Supp. 902, 909 (D.C. N.Y. 1971), *aff'd*, 406 U.S. 951 (1972); *Forest Hills Early Learning Center v. Lukhardt*, 728 F.2d 230, 240 (4th Cir. 1984).

¹⁴ *NAACP*, *supra* n.13, at 444.

¹⁵ *Bates v. Little Rock*, 361 U.S. 516, 524 (1960).

¹⁶ *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Sherbert*, *supra* n.13, at 406.

¹⁷ *Bates*, *supra* n.15, at 524.

¹⁸ *Sherbert*, *supra* n.13, at 408.

¹⁹ *State v. Yoder*, 406 U.S. 205, 215 (1972); *Dennis v. Charnes*, 571 F.Supp. 462 (D.Col. 1983) (picture on driver's license).

²⁰ *Intern. Soc. of Krishna Consciousness v. Evans*, 440 F.Supp. 414 (S.D. Ohio 1977).

²¹ *Holy Spirit Association v. Town of New Castle*, 480 F.Supp. 1212, 1216 (S.D. N.Y. 1979).

This Court recognized that the normal rules of case law determination may not apply in connection with such "balancing":

"The question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives . . .", *Firemen v. Chic., RI and PRR*, 393 U.S. 129, 138-9 (1968).

The District Court here was correct when it said that ". . . it appears that the State's remedy is a political not a legal one," App. 37.

The Court of Appeals in this case gave major consideration to questions of safety and public policy:

". . . the Members . . . of Congress . . . agreed that the problem of drunk driving disproportionately touches the lives of young adults." [citing statements in *Congressional Record*]

"Significantly . . . most members of Congress believe the problem of young adults drinking and driving is not purely a local or intrastate problem but rather a problem with substantial national and interstate ramifications . . ." [citing *Congressional Record*]

"Finally we conclude that Congress's decision to condition a portion of a state's federal highway funds on the adoption of a minimum drinking age of 21 is necessarily related to Congress's interest in achieving a national uniform minimum drinking age . . . we find that Section 158 falls under the scope of Congress's power under the spending clause."

In an oral argument before this Court, Solicitor General (later Justice) Jackson engaged in the following colloquy:

Mr. Jackson. Your Honors upheld the Social Security Act.

The Chief Justice. I know. That is a special story on its own facts . . . " *State of Oklahoma v. Woodring*, 309 U.S. 623 (1940), "Transcript of Proceedings," Jan. 29, 1940, Vol 1, p. 81.

The instant case represents a "special story" which merits special consideration in balancing "on its own facts."

Another highly relevant factor is the relationship of the Federal statute here under review to the use of the streets and highways of the nation. Under the Clean Air Act's health-oriented program to reduce air pollution, 42 U.S.C. 7410(a) (1), the Environmental Protection Agency required that Ohio's plan for vehicle inspection and maintenance deny registration to vehicles which did not pass emission inspection. The State unsuccessfully sought an injunction. The court ruled that there was no violation of the Tenth Amendment:

". . . air pollution is a national problem . . . its control is within the authority granted by the Commerce Clause . . ."

"Ownership and control of streets and highways, along with the historic practice of licensing of vehicles, however, do combine to provide a completely rational basis for placing upon the State the obligation to prevent use of these facilities by noncomplying vehicles." *U.S.A. v. Ohio Dept. of Highways*, 635 F.2d 1195, 1204 (6th Cir. 1980), cert. denied 451 U.S. 949 (1981).

This Court has at least twice, *per curiam*, dismissed appeals "for want of a substantial federal question" in cases where State statutes dealing with statutory obligations on drivers using state highways and streets were alleged to be unconstitutional under the due process provision of the Fourteenth Amendment.

The most recent such instance occurred on February 23, 1987 in *Kohrig v. Illinois*, 55 L.W. 1357 (Feb. 24, 1987). The Illinois Supreme Court had sustained the constitutionality of an 1985

Illinois mandatory safety seat belt law making it a criminal offense for the occupants of a motor vehicle's front seat not to wear a safety seat belt while driving on the State's streets and highways, 113 Ill.2d 384 (1986). The Illinois Supreme Court ruled that the statute

"... does not infringe upon defendant's fundamental right of privacy protected by the fourteenth amendment . . .", p. 396,

"The State can enact laws aimed at reducing traffic accidents, since such laws are clearly related to the health, welfare and safety of the public . . .", p. 401,

"Because of the drain on private and public resources caused by highway accidents society has a legitimate interest in minimizing injuries which result from such accidents.", p. 404.

An earlier case held likewise. In *Bisenius v. Karns*, 42 Wis.2d 42 (1969) appeal was also dismissed by this Court, *per curiam*, "for want of a substantial federal question," 396 U.S. 709 (1969). There the Wisconsin court had ruled:

"There is no place where any such right to be let alone would be less assertable than on a modern highway with cars, truck, buses and cycles whizzing by at sixty or seventy miles an hour. When one ventures onto such a highway he must be expected and required to conform to public safety regulations and controls . . . The concept of public safety is an evolutionary, not a fixed or static proposition." p. 55

In *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), this Court considered a constitutional challenge to the social security tax for unemployment compensation insurance, a statute that arose out of the nation's depression of the '30s. There Justice Cardozo said for the Court that the statute did not violate the Tenth Amendment:

"To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge . . . The problem had

become national in area and dimensions. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare . . ." pp. 585-6

"In such circumstances, if in no others, inducement as persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for the present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.", 591

See also Chief Justice Hughes in *Atchison etc. Ry Co. v. U.S.*, 284 U.S. 248, 260 (1932) (the great depression); and Justice Stewart, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978) ("... the broad and desperate emergency economic conditions of the early 1930's . . .").

The instant case represents a "special story" involving a nationwide health emergency of crisis proportions, just as serious as other national emergencies considered by this Court. The Federal 21-year minimum age drinking statute is an appropriate constitutional means for Congress to deal with a major public health epidemic touching every part of the nation.

THE CONSTITUTION IS A LIVING DOCUMENT

The extraordinary genius of the Constitution is its adaptability to the problems of successive generations of Americans.²² The Constitution is not static, but is a dynamic force in American life. According to *The Federalist*, the Constitution framed "a government for posterity."²³

The Constitution is a living document which adjusts to the changing needs of the American people. As Chief Justice Marshall said, the Constitution is

²² *Appalachian Coal Inc. v. U.S.*, 288 U.S. 344, 360 (1933, per Ch. J. Hughes).

²³ *The Federalist* (Modern Library ed.), No. 34, p. 208.

"... intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs"; "its means are adequate to its needs."²⁴

Cardozo once wrote:

"The great generalities of the Constitution have a content and significance that vary from age to age."²⁵

Justice McKenna wrote for the Court:

"Time works changes, brings into existence new conditions and purposes . . . This is peculiarly true of constitutions . . . In the application of a constitution, therefore our contemplation cannot be only of what has been, but of what may be. . ."²⁶

This Court said:

"Nor is the concept of the general welfare static. Needs that were narrow and parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times."²⁷

And more recently:

"[W]hen we are dealing with words that also are a constitutional act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."²⁸

²⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415, 424 (1819).

²⁵ *Nature of the Judicial Process* (1921), p.17.

²⁶ *Weems v. U.S.*, 217 U.S. 349, 373 (1910).

²⁷ *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

²⁸ *Missouri v. Holland*, 352 U.S. 416, 433 (1970).

A recent decision by a Federal Court of Appeals stated:

"Applying the legal tests that have evolved in constitutional law invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests."²⁹

In *The Federalist*, Hamilton wrote

"Constitutions of civil government are not framed upon calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the nature of human affairs. . . There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit their capacity."³⁰

Very recently, Chief Justice Rehnquist told the American Bar Association:

"... the provisions in the Constitution for the interpretation of the instrument, and for amendment and change in that interpretation, were a model of enlightenment at least equal to any of its substantial provisions . . ."

He also stated that the Constitution

"... gave us procedural provisions by which the instrument was to be interpreted, amended, and changed, which assured both the efficacy and the flexibility of the substantive provisions which it contained. The framers provided for judicial review— . . ."

²⁹ *Dunagen v. City of Oxford, Miss.*, 718 F.2d 738, 748, n.8 (5th Cir. 1983), cert. denied 82 L.Ed.2d 855 (1984).

³⁰ *The Federalist* (Modern Library Ed.) No. 34, p. 208.

He concluded his remarks with the statement:

"Thus the framers . . . also provided for a method of appointment to the federal judiciary which could in the long run temper judicial interpretations which were believed to be erroneous by a majority of the people. It is this finely tuned mechanism by which Constitutional law is declared, interpreted, and on occasion changed, which is perhaps the greatest gift of the framers of the Constitution in Philadelphia in 1787."³¹

A recent scholarly article stated:

". . . constitutional cases often involve controversial questions of public policy . . . Like politicians, the Justices must choose among conflicting values . . . Like serious politicians, the Justices should care about the social consequences of their decisions . . ."³²

A distinguished American legal philosopher said:

"As a historic fact it cannot be denied that the vast body of constitutional law has been made by our courts in accordance with their sense of justice or public policy . . ."³³

³¹Copy of speech provided by Supreme Court.

³²Bryden, David P., "Politics, the Constitution and the New Formalism," 3 *Constitutional Commentary* 415, 417 (Summer 1986).

³³Cohen, Morris R., *Law and the Social Order* 138 (1933).

Elsewhere he said:

"The constitutional issues decided by our highest courts are, after all, not issues of definite law but opinions as to policies which require knowledge of the facts involved."³⁴

And,

"The most important issues that come before the [Supreme] court are not questions of well-settled law but concern issues of public policy about which well-informed and well-disposed people differ . . ."³⁵

If the Constitution were not a living, dynamic document, how could one explain this Court's nullification of the death penalty laws by reinterpreting a 200-year-old and long-settled dictum of American legal history because of an avowed need for "a fresh look at the question"?³⁶ Or this Court's unanimous reversal³⁷ of the 60-year-old doctrine that had held that separate facilities for black people were constitutionally valid?³⁸ It is especially relevant that in *Brown* this Court justified its constitutional reinterpretation by the open use of psychological and sociological data.³⁹

This Court has said: ". . . The range of judicial inventiveness will be determined by the nature of the problem."⁴⁰

The instant case is not the first time that South Dakota has gone into Federal Court to thwart the Federal Government's conditioning of the State's receipt of Federal funds by requiring compliance with nationally applicable Federal regulations.

³⁴From an unpublished paper quoted in Rosenfield, H.N., "A Philosopher's Influence on the Law," 26 *The Catholic Lawyer* 52, 53 (1980).

³⁵*Ibid.*, at 57.

³⁶*Johnson v. Louisiana*, 406 U.S. 356, 372 n.9, 376 (1972).

³⁷*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

³⁸*Plessy v. Ferguson*, 163 U.S. 537 (1896).

³⁹*Brown*, *supra* n. 37 at 494. See also, Loh, Wallace D., *Social Research in the Judicial Process: Cases, Readings and Text* (1984); *Dunagen v. City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983), *cert. denied*, 82 L.Ed.2d 855 (1984).

⁴⁰*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1947).

Prior efforts related to the same respondent U.S. Department of Transportation's enforcement of the Highway Beautification Act on penalty of losing 10% of its highway construction funds for non-compliance.⁴¹

The instant case, dealing with the 21-year minimum drinking age statute again raises the very same constitutional issues on which the prior efforts failed. In addition, this Court has already sustained the constitutional validity of a virtually identical State statute. *Craig v. Bowen*, 429 U.S. 190 (1976); *rehearing denied* 429 U.S. 11124 (1977).⁴²

The instant case cries out for this Court to meet the nationwide needs of the American people by rejecting South Dakota's claim as constitutionally invalid under the circumstances of this case.

CONCLUSION

The *Amicus* respectfully urges the Court to dismiss the appeal or to affirm the decision of the Court of Appeals.

Respectfully submitted,

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⁴¹ *South Dakota v. Volpe*, 353 F.Supp. 335 (D.C. S.D. 1973); *South Dakota v. Adams*, 587 F.2d 915 (8th Cir. 1978), *cert. denied* 441 U.S. 961 (1979); *South Dakota v. Adams*, 506 F.Supp. 50 (D.C. S.D. 1980); *South Dakota v. Adams*, 506 F.Supp. 60 (D.C. S.D. 1980), *aff'd*, 635 F.2d 698 (8th Cir. 1980), *cert. denied* 451 U.S. 984 (1981).

⁴² See also *Houser v. State of Washington*, 85 Wash. 2d 803 (Sup. Ct. of Washington 1975, *en banc*); *Felix v. Milliken*, 463 F.Supp. 1360 (D.C. Mich. 1978) (Michigan statute); *Republican College Council v. Winner*, 357 F.Supp. 739 (D.C. Pa. 1973) (3-judge court) (Penn. statute); *Gabree v. King*, 614 F.2d 1 (1st Cir. 1980) (Mass. statute).

AMICUS CURIAE

BRIEF

No. 86-260

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Supreme Court, U.S.
FILED

NOV 13 1986

JOSEPH F. SPINALE, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF SOUTH DAKOTA,

Petitioner,

—v.—

THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
IN HER OFFICIAL CAPACITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

**BRIEF AMICI CURIAE
NATIONAL COUNCIL ON
ALCOHOLISM, ET AL.**

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8194

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. CONGRESS ACTED REASONABLY AND CONSTITUTIONALLY IN ENACTING § 158	10
A. The Breadth And Toll Of Drinking And Driving Constitute A Serious Threat To Safety Affecting All Americans On The Nation's Highways And Merit A Comprehensive National Response	11
B. The Enactment In Every State Of A Uniform Minimum Drinking Age Of 21 Is One Proven And Effective Strategy To	

	<u>Page</u>
Address The Epidemic Of Death On The Nation's Highways	18
C. Section 158 Does Not Conflict With The Drinking Age Laws Of The State Of South Dakota Or Violate The Tenth Or Twenty-First Amendment	35
II. THE FEDERAL INTEREST IN SAVING LIVES, PROTECTING PROPERTY AND REDUCING THE COSTS OF HIGHWAY ACCIDENTS FAR OUTWEIGHS SOUTH DAKOTA'S LOCAL INTEREST IN PERMITTING 19 AND 20 YEAR OLDS TO CONSUME LOW- ALCOHOL BEER	47
A. The States' Power Over Intoxicating Liquors Under The Twenty-first Amendment Is Not Absolute	48
B. Section 158 Is A Constitutional Exercise of Congress' Power To Advance An Important Federal Interest	52

	<u>Page</u>
CONCLUSION	60
APPENDIX	

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Battipaglia v. N.Y. State Liquor Authority</u> , 745 F.2d 166 (2d Cir. 1984) (Winter, J., dissenting)	46
<u>Buckley v. Valeo</u> , 424 U.S. 1 (1976)	35
<u>California Liquor Dealers v. Midcal Aluminum</u> , 445 U.S. (1980)	49,50 59
<u>Capital Cities Cable v. Crisp</u> , 467 U.S. 691 (1984)	<u>passim</u>
<u>Craig v. Boren</u> , 429 U.S. 190 (1976)	5
<u>Helnesing v. Davis</u> , 301 U.S. 619 (1937)	35
<u>Hostetter v. Idlewild Bon Voyage Liquor Corp.</u> , 377 U.S. 324 (1964)	5
<u>Jameson & Co. v. Morgenthau</u> , 307 U.S. 171 (1939)	49

	<u>Page</u>
<u>King v. Smith</u> , 392 U.S. 309 (1968)	39
<u>New State Ice Co. v. Liebman</u> , 285 U.S. 262 (1932)	44
<u>Oklahoma v. Civil Service Commission</u> , 330 U.S. 127 (1947)	39
<u>State of South Dakota v. Dole</u> , 791 F.2d 628 (8th Cir. 1986)	3,6 10,11
<u>State of South Dakota v. Goldschmidt</u> , 635 F.2d 698 (8th Cir. 1980), cert. denied, 451 U.S. 984 (1980)	42
<u>State of Vermont v. Brinegar</u> , 379 F.Supp. 606 (D.C.Vt. 1974)	42
<u>324 Liquor Corp. v. Duffy</u> , 55 U.S.L.W. 4094 (1987) ...	50,53 54
<u>United States v. Topco Associates</u> , 405 U.S. 596 (1972)	54

	<u>Page</u>
<u>United States Constitution:</u>	
U.S. Const. art. I, § 8, cl. 1	4
U.S. Const. art. I, § 8, cl. 2	5
U.S. Const. amend. X	38,41 42,43
U.S. Const. amend. XXI	<u>passim</u>
<u>Federal Statutes:</u>	
23 U.S.C. §§ 101-408	39
23 U.S.C. § 131	40,42
23 U.S.C. § 134	40
23 U.S.C. § 154	40
23 U.S.C. § 158	<u>passim</u>
23 U.S.C. §§ 401-408	40
23 U.S.C. § 408	41
<u>State Statutes:</u>	
S.D. Cod. L. 35-9-4	8
S.D. Cod. L. ch. 35-9	8

	<u>Page</u>
<u>Federal Executive Order:</u>	
Exec. Order No. 12,358, 47 Fed. Reg. 16,311 (1982)	16
<u>Legislative Materials:</u>	
Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 99th Cong., 2d Sess. (1986)	25,26,28
Remarks of Senator Lautenberg, 130 Cong. Rec. S8207-08 (daily ed. June 26, 1984)	6,7
<u>Agency Reports and Recommendations:</u>	
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	<u>Page</u>
DOT Pub. No. (HS) 80-176 (1982)	20
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	<u>Page</u>
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	<u>Page</u>
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	<u>Page</u>
Report Series No. 10, Fall 1981)	29
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Page

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21

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986
NO. 86-260

THE STATE OF SOUTH DAKOTA,

Petitioner,

v.

THE HONORABLE ELIZABETH H. DOLE,
SECRETARY OF TRANSPORTATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICI CURIAE
OF NATIONAL COUNCIL ON ALCOHOLISM, ET AL

STATEMENT OF INTEREST

The National Council on Alcoholism
and its 190 affiliates throughout the
country is the leading independent non-

profit organization in the United States concerned with alcoholism and other drug addictions, diseases and related problems. The Council was founded in 1944 and for over 40 years has provided leadership in the formulation of public policy on alcoholism and related issues. In recent years particularly the Council has focused on the impact of the drug alcohol on the youth of the nation. Because of the long term intensive interest of Amici¹ in the medical, safety and other problems of youthful drinking, the Council and other Amici believe that they are particularly well equipped in support of the Respondent to set out the

¹ See Appendix for description of interest of other Amici.

underlying factual and statistical support for what the court below found, namely that:

... Congress reasonably could have concluded the problem of young adults drinking and driving is not a purely local or intrastate concern but rather is a concern of ... national proportions. We further believe Congress, in its reasoned discretion, could determine that a uniform minimum drinking age would lessen that problem and improve the safety of our nation's highways for all Americans. Finally, Congress's decision to condition a portion of a state's federal highway funds on the adoption of a minimum drinking age ... is reasonably related to Congress's interest in achieving a nationally uniform minimum drinking age.²

STATEMENT OF THE CASE

This case presents the question of

² State of South Dakota v. Dole, 791 F.2d 628, 632 (8th Cir. 1986).

whether the Congress of the United States may, acting pursuant to the authority of the Spending Clause³, seek to establish a national uniform minimum drinking age throughout the several States by conditioning the receipt by any State of a small portion of its allocated federal highway funds upon its adoption of a minimum drinking age of 21. See Section 158 of the Surface Transportation Assistance Act (Pub. L. No. 98-363, 98 Stat. 437, 23 U.S.C. (Supp II) Section 158).⁴ Petitioner has asserted that an exercise of such a power by Congress violates the second clause of the

3 U.S. Const. art. I, § 8, cl. 1.

4 Section 158 since consideration of this case by the trial court below has been amended by Pub. L. No. 99-272, Title IV § 4104, Apr. 7, 1986, 100 Stat 114.

Twenty-first Amendment.⁵ The court below relying on the clear precedent of this Court's decisions,⁶ rejected this claim and found that the primary intent of the Amendment was to provide for an exception to what would otherwise be the inhibiting effect on state action of the Commerce Clause.⁷

The court below held that Section 158 did not conflict with South Dakota's law permitting 19 and 20 year olds to buy

5 U.S. Const. Amend. XXI, cl. 2.

6 See Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964); Craig v. Boren, 429 U.S. 190 (1976) cited with approval in Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984).

7 U.S. Const. art. I, § 8, cl. 2.

low-alcohol beer and that, consequently, a balancing of state and federal interests was not required.⁸

SUMMARY OF ARGUMENT

Amici file this brief in order to marshal the evidence from governmental and private studies which directly support the judgment of the Congress that there exists a monumental and pervasive national safety problem (not susceptible to local remedies) brought about by youthful consumption of the drug alcohol⁹ and the reasonableness of the means

⁸ 791 F.2d at 633-4.

⁹ In connection with legislative history for Section 158, see Remarks of Senator Lautenberg, 130 Cong. Rec. S8207-08 (daily ed. June 26, 1984) ("Drunk Driving is a National Epidemic").

selected by Congress to combat this acute national problem - encouragement of the enactment of a uniform minimum drinking age.¹⁰

Although Amici will show, as found by the court below, that no conflict in a constitutional sense exists between Section 158 and South Dakota's legislation permitting 19 and 20 year olds to consume low-alcohol beer, Petitioner asserts that such a conflict exists and that the state's interest in its drinking age statute must prevail over the national safety concerns addressed in Section 158; therefore, Amici will demonstrate

¹⁰ Id. S8209 ("The [President's] Commission [on Drunk Driving] recommended that 100 percent of Federal-aid highway funds be withheld. ... Our amendment [is] more limited but still effective...")

that if the "balancing of interests" calculus is to be invoked on the assumption that a conflict exists, the federal interest in the preservation of life and property on the nation's highways would clearly outweigh the narrow, parochial interest of the State of South Dakota in maintaining a relatively minor part of its regulatory scheme - a statute permitting 19 and 20 year olds to consume low-alcohol beer.¹¹ This interest of the state must be viewed in the historical context that for 50 years South Dakota has maintained, without interruption, a uniform drinking age of 21 for all other alcoholic beverages.¹² It seems clear

11 S.D. Cod. L. 35-9-4.

12 S.D. Cod. L. Ch. 35-9.

the Twenty-first Amendment was adopted, as the court below found, primarily to permit the several states to regulate the importation, sale and distribution of alcohol in a manner which otherwise would have violated the negative or "dormant" power of the Commerce Clause. Congress may constitutionally respond to a national epidemic of death and destruction on the country's highways by the exercise of its broad powers to provide for the general welfare under the Spending Clause.

ARGUMENT

I. CONGRESS ACTED REASONABLY AND CONSTITUTIONALLY IN ENACTING § 158.

The court below found that Congress reasonably concluded that the problem of young adults drinking and driving is not purely a local concern but rather a national problem. 791 F.2d at 632. In addition, the court below concluded that Congress "in its reasonable discretion" could find that a uniform minimum drinking age would address the problem, and finally that the conditioning of a small portion of a state's Federal highway funds on the adoption of such a minimum drinking age is "reasonably related to Congress' interest in

achieving a nationally uniform minimum drinking age". *Id.* Amici will show in this section that two decades of federal and other studies amply support the conclusions reached by Congress and the court below.

A. The Breadth And Toll Of Drinking And Driving Constitute A Serious Threat To Safety Affecting All Americans On The Nation's Highways And Merit A Comprehensive National Response.

Alcohol is the most widely available and most destructive drug in America. In 1981, the equivalent of 2.77 gallons of absolute alcohol was sold per person over age 14.¹³ Alcoholism is one of the most serious public health problems in the

¹³ National Institute on Alcohol Abuse and Alcoholism (NIAAA), Fifth Special Report to the U.S. Congress on Alcohol and Health from the Secretary of Health and Human Services, xiii DHHS Pub. No. (ADM) 84-1291, 1983.

United States today. Of the approximately 110 million adult drinkers in 1985, 10.6 million were alcoholics or drinkers who experienced one or more symptoms of dependency. Another 7.3 million adults experienced at least one serious consequence of alcohol use in the preceding year.¹⁴

Alcoholism is by no means the only major health problem associated with alcohol use.¹⁵ There are almost 100,000 deaths from alcohol-related causes.

Injury is a major cause of death in the nation, and alcohol is a major

14 NIAAA, Department of Biometry and Epidemiology, "Working Paper: Projections of Alcohol Abusers, 1980, 1985, 1990," 5-6 (1985) (prepared by John Noble).

15 Ravenholt, R.T., M.D., Addiction Mortality in the U.S. (National Institute on Drug Abuse (NIDA), March 1983).

contributor to both the incidence and the level of severity of injury. Drinking is present in 50 to 55 percent of the fatal motor vehicle accidents.¹⁶ The estimated annual cost of alcohol-related motor vehicle accidents is almost \$12 billion.¹⁷ The Federal government paid approximately \$2 billion to cover costs due to this economic toll, more than any other source.¹⁸

16 National Highway Transportation Safety Administration, National Center for Statistics and Analysis, U.S. Department of Transportation, "Drunk Driving Facts", June 1984.

17 National Safety Council, Accident Facts: 1986 Edition 52 (1986).

18 National Institute on Alcohol Abuse and Alcoholism, Toward a National Plan to Combat Alcohol Abuse and Alcoholism 23 (June 1986).

Federal agency attention to alcohol as a major threat to public safety began in 1969 with the national alcoholism treatment and prevention activities of the National Highway Traffic Safety Administration (NHTSA). NHTSA's first major safety initiative, the Alcohol Safety Action Project (ASAP), marked the beginning of a comprehensive national response to the devastating human toll caused by traffic fatalities - at least fifty percent of which were alcohol-related.¹⁹ The highway death toll peaked in 1969 with a frightening 53,543 lives lost.

¹⁹ Volpe, John, "Alcohol Public Safety," Alcoholism and Alcohol Related Problems: Issues for the American Public 117 (Louis Jolyon West, M.D. ed.).

By 1982 the National Transportation Safety Board was focusing increasingly on highway safety and youthful drinking and in the face of a growing body of knowledge on the effect of alcohol on highway fatalities of the under 21-year old driver, the Board soon recognized that youthful drinking and driving exacted a large scale death toll. The Board issued a number of safety recommendations (NTSB), among which was H-82-18 regarding the need for state 21 year old drinking age laws.²⁰ The Board wrote to the Governor of every state that did not have such a law, and asked them to enact such legislation in their own state.

²⁰ National Transportation Safety Board, Safety Recommendation(s) H-82-1, (July 22, 1982).

Since 1982, for example, over thirty states have raised their minimum legal drinking age to 21 years. Many of these same states had experimented with lowering the age in the early 1970s, with the outcome of a significant increase in fatalities for 18-20 year old drivers.

During the early 1980's, alcohol use as a highway safety issue was capturing more substantive interest throughout the federal government. In late 1981, at Congress' urging, President Reagan signed an Executive Order to establish a Presidential Commission Against Drunk Driving.²¹ The charge of the one-year organization was to encourage state and

²¹ Exec. Order No. 12,358, 47 Fed. Reg. 16,311 (1982) (established the Commission and appointed John A. Volpe as the Chairman).

local governments, as well as the private sector, to implement programs to reduce the carnage caused by the drinking driver.

To highlight the need for such programs, the Presidential Commission undertook a series of national public hearings during the remainder of 1982 and listened to enforcement officers, prosecutors, judges, probation personnel as well as crash victims. A wide range of national experts from other fields including educators, legislators, health professionals, religious leaders, members of the media, and business executives also contributed their views on the problem and its possible solutions. The Final Report of the Commission, issued in

November 1983, outlined 37 recommendations encompassing public awareness and education, private sector efforts, alcoholic beverage regulation, enforcement, prosecution, adjudication, licensing administration and treatment. The only recommendation aimed specifically at action by the Federal government was the adoption of a uniform 21 year old drinking age.²²

B. The Enactment In Every State Of A Uniform Minimum Drinking Age Of 21 Is One Proven And Effective Strategy To Address The Epidemic of Death On The Nation's Highways.

It is a startling fact that alcohol-related highway deaths are the number one killer of 15-to 24 year-

²² Presidential Commission on Drunk Driving Final Report, November 1983, 10-11.

olds.²³ Drivers 16-24 years old represent 20 percent of licensed drivers and less than 20 percent of total miles driven, yet account for 42 percent of all fatal alcohol-related crashes.²⁴ According to the U.S. Department of Transportation, of the 25,000 persons who die each year in drinking-driver accidents, 5,000 are teenagers. Most of the victims of fatal crashes involving youthful drivers are the drivers themselves or their youthful passengers.²⁵ In addition,

²³ National Center for Health Statistics, Public Health Service, US DHHS Health, United States, 1980, Pub. No. (PHS) B1-1232, December 1980.

²⁴ U.S. Dept. of Transportation, Fatal Accident Reporting System, 1982, DOT Pub. No. (HS) 806-566 (1984[h]).

²⁵ Cook, Phillip J. and George, Tauchen "The Effect of Minimum Drinking Age (footnote continued)

teenage drivers are involved in one out of every four injury accidents, a total of 650,000 injured teenagers in 1980.²⁶ The cost of this frightening toll in lives and quality of life is substantial. A New York study found that alcohol-related accidents caused by eighteen year old drinking drivers in 1982 alone will cost New York State over \$90 million in property damage, lost income, emergency services, medical and insurance costs.²⁷

(footnote continued from previous page)
Legislation on Youthful Auto Fatalities 1970-1977" 175, Journal of Legal Studies, vol. xiii (January 1984).

26 Nat'l. Highway Traffic Safety administration, The National Accident Sampling System "Report on Traffic Accidents and Injuries for 1979-1980," DOT Pub. No. (HS) 804-176 (1982).

27 Lillis, Robert P. Highway Safety Considerations in Raising the Minimum
(footnote continued)

A 1979 New York Division of Alcoholism and Alcohol Abuse survey of New York Division of Motor Vehicles accident file found that the crash rate for drinking drivers in the 18-21 year old group was over four times the crash rate for over 21 year old drinking drivers. The crash rate for 18-21 year old non-drinking drivers is only about twice the crash rate for over 21 year old non-drinking drivers.²⁸ Increasing the

(footnote continued from previous page)
Legal Age for Purchase of Alcoholic Beverages to 19 in New York State 1
(Bureau of Alcohol and Highway Safety Division of Alcoholism and Alcohol Abuse. Research Report No. 12, Winter 1982).

28 Williams, Timothy P., Robert P. Lillis, William R. Williford, "The Relative Role of Alcohol as a Contributing Factor in the Overrepresentation of Young Drivers in Highway Crashes" (Bureau of Alcohol and Highway Safety)
(footnote continued)

availability of alcohol to those under 21 through lowering the minimum legal drinking age geometrically increases the youthful drivers intrinsic tendency to drive dangerously. Lowering the legal drinking age has been frequently associated with an immediate increase in alcohol-related traffic crash involvement among 18-20 year old drivers.²⁹ Between 1970 and 1975, some 29 states reduced the legal minimum age for purchasing

(footnote continued from previous page) Highway Safety, New York State Division of Alcoholism and Alcohol Abuse Research Report Series No. 6, Fall 1981).

29 Wagenaar, Alexander C., "Preventing Highway Crashes by Raising the Legal Minimum Age for Drinking: The Michigan Experience 6 Years Later" 102, Journal of Safety Research, Vol. 17, No. 3 (1986).

alcoholic beverages.³⁰ Lowering the legal age for alcohol consumption is frequently associated with an immediate increase in alcohol-related traffic crash involvement among the group affected.³¹ In Michigan, a state in which the effects of legal drinking age changes have been carefully evaluated, lowering the legal age for all alcoholic beverages from 21 to 18 in January 1972 was followed by a 17 to 35 percent increase in alcohol-related crash involvement among youth. Fifteen states raised their drinking ages between 1975 and 1982. NHTSA studied thirteen of those states where sufficient data was available to determine whether

30 Wagenaar, supra, at 101-109.

31 Id. at 102.

the higher drinking age was accompanied by fewer fatal accident involvements by young drivers. The effects range from a 29 percent reduction for Florida to a 14 percent increase for Maine. None of the three calculated increases are considered statistically significant, while three of the decreases, in Florida, Michigan and Minnesota, are statistically significant.³² In the first twelve months after Michigan raised its drinking age, analyses revealed a 19.5 percent reduction in "alcohol-related crash involvement attributable to the increase in the legal

³² Arnold, R.D., Effect of Raising the Legal Drinking Age on Driver Involvement in Fatal Crashes: The Experience of Thirteen States (National Center for Statistics and Analysis, National Highway Traffic Safety Administration, November 1985).

age."³³ NHTSA's conclusions assert the potency of this prevention policy and the need for its extension to the remaining states with drinking ages under 21 years old:

If all states that had limits less than 21 years, raised the age to 21, the expected number of involvements of 18-20 year old drivers with fatal accidents would be reduced by 500. The expected number of lives saved annually in fatal accidents sufficient to produce this much reduction in driver involvements is about 550.³⁴

In 1986 the General Accounting Office studied the available research on the effects of increasing the minimum drinking age.³⁵ It concluded that the

³³ Wagenaar, supra, at 106.

³⁴ Arnold, supra, at 21.

³⁵ Hearing before the Subcomm. on Investigations and Oversight of the House (footnote continued)

available research shows that raising the drinking age has a direct effect on reducing alcohol-related traffic accidents among affected age groups nationally.³⁶ The research evaluated also supported the assertion that states raising their drinking ages can generally expect fewer traffic accidents.

(footnote continued from previous page)
Comm. on Public Works and Transportation,
99th Cong., 2d Sess. (1986) (testimony on
"Evaluations of Minimum Drinking Age
Laws" of Eleanor Chelimsky, Director of
Program Evaluation and Methodology
Division, General Accounting Office
Statement 4,23-39).

³⁶ Id. at 27.

The "Cross-Border" Phenomenon: Mandate for Federal Action

It is clear from analytical studies by the Federal government as well as private researchers that the full potential of a 21 drinking age in saving lives and reducing highway accidents will not be realized unless all states are persuaded to enact uniform drinking age legislation. Problems arise from what has been termed the "cross-border" or "blood border" phenomena - the incentive for young drivers to cross state borders to purchase alcohol not legally available within their own state. Prior to the passage in 1984 of Section 158, an

estimated 56 percent of the total borders between states had different legal drinking ages.³⁷

The impact of "border-crossing" on accidents involving youth and alcohol is an admittedly difficult statistical problem to evaluate. Certain studies, however, have been produced which support the finding of Congress and others that "border crossing" is a major problem in highway safety.

Studies conducted by the New York State Division of Alcoholism and Alcohol Abuse in 1981, when New York's drinking age was 21 and Pennsylvania was New York's only bordering state with a 21 drinking age, found a statistically

³⁷ Id. at 34.

significant over-representation of under-21 Pennsylvania drivers involved in alcohol-related crashes in neighboring New York counties.³⁸ Almost 50 percent of Pennsylvania drivers involved in alcohol-related crashes in New York were under 21 years old.³⁹

Again, a 1985 report on drinking and driving, prepared for the State of Wisconsin found that when Illinois increased its drinking age to 21 at a time when Wisconsin's age was 19, there was a

³⁸ Lillis, Robert P., Timothy P. Williams, William R. Williford, Reported Alcohol Crashes Involving Under 21 Year Old Pennsylvania Drivers in Ten New York Border Counties - The Relationship of Purchase Age Policy to Redistribution of Problem Incidence (Bureau of Alcohol and Highway Safety, New York State Division of Alcoholism and Alcohol Abuse Research Report Series No. 10, Fall 1981).

³⁹ Id. at 11, Table 3.

statistically significant increase in the number of 19 year old Illinois drivers involved in alcohol-related accidents in neighboring Wisconsin counties.⁴⁰ A 1980 Illinois increase in its drinking age to 21 (while Wisconsin's drinking age was lower) led to a 30 percent increase in the number of Illinois drivers involved in alcohol-related accidents in neighboring Wisconsin counties. The study concludes:

"To varying degrees, Wisconsin's lower legal drinking age has attracted young people who are too young to drink legally in their home state. Legislators, enforcement agencies, and others

40 Percentage of 19 year old Illinois drivers involved in Wisconsin border crashes increased from 32.8 to 49%. See Hughes, Dennis J. and Kam S. Leung, Driver Age and Alcohol-Related Accidents in Wisconsin (Wisconsin Dept. of Transportation, Division of Planning and Budget, Bureau of Policy Planning and Analysis, April 1985).

have called attention to this over the years, arguing that the drinking age differential has contributed to unusually high numbers of alcohol-related traffic accidents among these so-called 'border hoppers'. Law enforcement officials have also cited increases in arrests for vandalism and disorderly conduct near border county taverns and bars as further manifestations of the 'border hopping' problem."⁴¹

In a 1983 analysis, after some of New York's border states had increased their drinking ages, 18-19 year old drivers represented 5 percent of the licensed drivers in Massachusetts, yet they represented 31 percent of the Massachusetts drivers who were involved in alcohol-related crashes in neighboring

41 Lillis, Robert P., Timothy P. Williams, William R. Williford, Special Policy Consideration in Raising the Minimum Drinking Age: Border Crossing by Young Drinkers (Paper presented at National Alcoholism Forum, Detroit, MI, April 12-15, 1984).

New York counties.⁴² Overall, out-of-state underage drinkers represent 27 percent of all drivers involved in alcohol-related crashes in bordering New York counties.⁴³ New York drivers in the same age group represent 16 percent of all drivers involved in alcohol-related crashes in the same counties.⁴⁴

Lillis *et al* conclude that between 160 and 190 fatal or serious-injury crashes in the region during the period 1980-82 may be attributable to the cross-border phenomenon.⁴⁵

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Clearly, if the full benefits of a 21 drinking age policy are to be realized, all states must be encouraged to enact this legislation. Certainly, the legislative history of state deliberations on drinking age legislation has indicated that adjacent states' maintenance of a lower drinking age has acted as a barrier to a state legislature's willingness to raise the drinking age at home.⁴⁶ Finally, differential drinking

⁴⁶ In Spring of 1984 the New York legislature defeated a bill that would have raised the minimum legal drinking age to 21 years in that state. Shortly thereafter, the Connecticut legislature defeated a similar measure in that state with a number of legislators citing the New York action as reason for withdrawal of their support. They did not want to create a situation that would encourage Connecticut young drivers to drive to New York to illegally purchase and consume alcohol. In 1985, the Coalition of
(footnote continued)

ages across states send mixed messages to young Americans about appropriate alcohol use, and consequently may hamper other prevention efforts aimed at the reduction of alcohol-related problems among this age group. It is no answer to the Congress' and the nation's concern with this problem for South Dakota and its amici to assert that border-hopping may be a problem in some Eastern states but is not a problem in South Dakota and its neighbors. Even accepting this premise, it ignores the epidemic and national character of the problem. One does not

(footnote continued from previous page)
Northeast Governors (CONEG) passed a recommendation urging that all New England states raise their drinking age to 21 immediately and at the same time to avoid the border problem. Recommendation Date January 30, 1985.

reject a vaccine on the grounds that the infection has not yet reached one's own front door.

The breadth and toll of youthful drinking and driving in America merits a comprehensive national response. The "blood border" problem demands a uniform national response and is perhaps the single most compelling rationale for the enactment of 21 drinking age legislation in every state.

C. Section 158 Does Not Conflict With The Drinking Age Laws Of The State Of South Dakota Or Violate The Tenth Or Twenty-First Amendment.

As this Court has repeatedly held,⁴⁷ when examining a federal law under constitutional challenge, Congress has broad

⁴⁷ Buckley v. Valeo, 424 U.S. 1, 90-91 (1976); Helmsing v. Davis, 301 U.S. 619 (1937).

power under the Spending Clause to provide for the general welfare and it need not choose the best or wisest solution in order to survive attack in the courts since the acts of Congress are entitled to considerable deference. Petitioner has argued, however, that Section 158 conflicts so substantially with a "core" power conferred on the states by the Twenty-first Amendment that it must fail. National Beer Wholesalers Association ("Beer Wholesalers"), amicus in support of Petitioner, have argued additionally that in the context of modern federal-state relations the states have become so dependent upon federal funds that conditioning the grant of even a small portion of federal highway funds on a state's

adoption of a 21 year drinking age conflicts substantially with the Twenty-first Amendment since the states are not in an economic position to forego the federal funds. Neither argument finds support in logic or in this Court's opinions. Only a small part of a state's total allocated highway funds are made conditional under Section 158, 5% in the first year⁴⁸ and an additional 10% in the second year.⁴⁹ Even after these amounts have been withheld, a state is permitted to recover for a period of time certain of the funds initially withheld.⁵⁰ This hardly constitutes "coercion" or

48 23 U.S.C. § 158(a)(1).

49 23 U.S.C. § 158(a)(2).

50 23 U.S.C. § 158(b).

"conflict" in a constitutional sense. Congress has not passed a law mandating a national 21 year old drinking age nor has it passed a law withholding 100% of federal funds (as was recommended by the Presidential Commission, see n.10, supra at 7). Petitioner and its amici have failed to cite a single case decided by this Court involving either the Twenty-first Amendment or the Tenth Amendment where the withholding of funds under the Spending Clause by Congress has been held to give rise to a constitutionally fatal conflict so as to nullify federal legislation. In fact, this Court has repeatedly held that Congress may impose conditions on federal spending just as it may elect to entirely eliminate spend-

ing.⁵¹ The only limitation on this power of discretion is that Congress may not impose a condition which is otherwise constitutionally forbidden.⁵² Congress may use its spending power either by granting funds or by withholding funds previously granted.

In fact, in the panoply of federal legislation dealing with federal aid for highways⁵³ there are a wide variety of instances in which the Congress has sought to achieve a federal purpose either by providing a subsidy to the states that adopt particular legislation or regulations or in withholding funds

51 Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947).

52 King v. Smith, 392 U.S. 309 (1968).

53 23 U.S.C. § 101 - § 408.

from states which fail to adopt legislation or regulations.⁵⁴ For example, the Congress has authorized grants to any state to support safety programs where the state's eligibility is conditioned on the adoption of very specific civil and criminal penalties, including jail terms, for drunken

⁵⁴ See *Id.* § 131 (encouraging states to control outdoor advertising adjacent to federal highways by the withholding of funds and by certain additional bonus payments); 23 USC § 134 (subsidy payments by the federal government to promote certain critical transportation planning); 23 USC § 154 (encouraging states to adopt a national speed limit and withholding of allocated funds in the event that such speed limit is not approved and enforced); 23 USC §§ 401-408 (encouraging highway safety programs, safety research, development of school bus driver training and alcoholic traffic safety programs by federal cash subsidies in each case).

driving.⁵⁵ Clearly, these incentive payments relate to areas involving police and criminal justice powers traditionally reserved to the states under the Tenth Amendment, but they do not "conflict" in a constitutional sense since the state is free to decline to adopt the federal standards.

It would seem a strange constitutional doctrine indeed which would permit, on the one hand, the federal government, both with cash subsidies and the withholding of apportioned federal highway funds, to encourage states to adopt laws and regulations restricting the placement of billboards in order to "protect the public investment . . . , to

⁵⁵ 23 U.S.C. § 408.

promote the safety and recreational value of public travel, and to preserve natural beauty."⁵⁶ and to deny the Congress the power to employ the same mechanism to provide for the general welfare by seeking to reduce the epidemic of death and destruction on the nation's highways. Of course, the argument may be raised that a law involving billboard control, while found to be constitutional against challenge for unlawful delegation of Congressional power and under the Tenth Amendment,⁵⁷ must be distinguished from a law involving the drinking age which

⁵⁶ 23 U.S.C § 131(a).

⁵⁷ State of South Dakota v. Goldschmidt, 635 F.2d 698 (8th Cir. 1980) cert. denied 451 U.S. 984; State of Vermont v. Brinegar, 379 F. Supp. 606 (D.C. Vt. 1974).

implicates powers granted to the states under the Twenty-first Amendment. The answer is that where there is no conflict between the federal and state law or regulation there can be no constitutional problem under either the Tenth or Twenty-first Amendment.

Section 158 is hardly an example of the exercise of an overweening federal power intruding into a domain traditionally reserved for the exercise by the states of their reserved powers. Nor is it a case where a particular economic, social, safety or health problem can be better addressed by state or local action crafted to respond to unique local conditions. The carnage on the national highways caused by youthful drinking, as

demonstrated in Section I above, is national in scope and can only be adequately addressed with national legislation encouraging a uniform minimum drinking age. The "blood border" problem (see discussion supra beginning at 26) cannot be adequately dealt with except by a uniform national drinking age. None of the arguments extolling the virtues and benefits, vital to our federal system, of state experimentation and exploration of multiple solutions to differing local problems, including the right of state and local governments to be wrong as they seek to establish new and creative solutions (See New York Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) are applicable here since

the problem of youthful drinking and driving simply cannot be effectively dealt with by a patchwork of legislation. It demands a uniform national approach. As shown supra at 32, state legislators are often discouraged from adopting a 21 year drinking law when confronted by a lower drinking age law in adjoining states.

South Dakota and Beer Wholesalers as amicus have argued that South Dakota's drinking law is a temperance statute implicating the "core" powers of the Twenty-first Amendment.⁵⁸ The words of a federal appellate judge speaking in a similar context involving the construc-

⁵⁸ Petitioner's brief at 19, Brief Amici Curiae of National Beer Wholesalers Association et al at 17.

tion of a New York statute regulating wholesale and retail liquor prices are apt - "the notion that this legislation was even remotely the result of ... [action] by aroused temperance groups is a quaint fiction." Battipaglia v. N.Y. State Liquor Authority 166, 180 (2d Cir. 1984) (Winter, J., dissenting). Similarly, it seems no more than a "quaint fiction" for South Dakota and the Beer Wholesalers to assert that the State is pursuing temperance goals by permitting 19 and 20 year olds to drink low-alcohol beer when it provides for a 21 year drinking age for wine, whiskey and every other kind of alcoholic beverage.

II. THE FEDERAL INTEREST IN SAVING LIVES, PROTECTING PROPERTY AND REDUCING THE COSTS OF HIGHWAY ACCIDENTS FAR OUTWEIGHS SOUTH DAKOTA'S LOCAL INTEREST IN PERMITTING 19 AND 20 YEAR OLDS TO CONSUME LOW-ALCOHOL BEER.

As demonstrated (supra beginning at 34), no conflict in a constitutional sense exists between the South Dakota statute and Section 158. South Dakota and its supporting amicus, The Beer Wholesalers, have attempted to argue to this Court that such a conflict does exist and that the Twenty-first Amendment requires that the federal statute be declared unconstitutional. While Amici disagree, they are prepared to demonstrate alternatively that the federal interest in saving lives far outweighs

the narrow, selective state interest in maintaining a special drinking age statute applicable to 19 and 20 year olds.

A. The States' Power Over Intoxicating Liquors Under The Twenty-first Amendment Is Not Absolute.

This Court has repeatedly held that the Twenty-first Amendment was passed primarily to enable the states to prohibit, if they choose, the use and importation of beverage alcohol within their borders, a power the exercise of which without the enabling authority of the Twenty-first Amendment would violate the dormant power of the Commerce Clause.⁵⁹ Contrary to assertions by Petitioner, the power of the states to act with respect to intoxicating liquors

⁵⁹ Capital Cities Cable v. Crisp, 467 U.S. 691 (1984).

has never been held to be absolute under the Twenty-first Amendment even with regard to so-called "core" powers.⁶⁰ We concede that earlier cases may be viewed as granting a more expansive interpretation to the Twenty-first Amendment, but it is very clear that recent decisions of this Court have uniformly held that the Twenty-first Amendment is not a grant of exclusive power. Where there is a conflict between the state legislative or regulatory action and the federal exercise of powers derived from other parts of the Constitution, a careful balancing of the federal and state interests must be made by the courts. Even with respect

⁶⁰ See California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939).

to the Commerce Clause, from whose wide constitutional mandate the Twenty-first Amendment may be said to have carved out a unique exception, this Court has repeatedly found that federal interests must prevail where they overbalance the state interest involved.⁶¹ If state action based on the Twenty-first Amendment must be balanced against, and, in appropriate cases, give way to a weightier federal interest derived from the Commerce Clause, then, a fortiori, Congressional action based on the Spending Clause must also be weighed and balanced against any competing state interest. South Dakota has failed to cite a single

⁶¹ Midcal, 445 U.S. 97; Capital Cities 467 U.S. 691; 324 Liquor Corp. v. Duffy, 55 U.S.L.W. 4094 (1987).

case in which the Spending Clause is weighed against the Twenty-first Amendment much less any case where a Congressional statute based on the Spending Clause is nullified by a competing state law.

Beer Wholesalers make an ingenious but flawed argument in their amicus brief supporting South Dakota: Assume that a state totally prohibits alcohol under its powers granted under the Twenty-first Amendment. The federal government would then not be constitutionally permitted to compel such a state to abandon its prohibition or to compel a neighboring state to adopt a similar prohibition in order to avoid the cross-border problem. Therefore, argue the Beer Wholesalers,

Congress may not "override" the Twenty-first Amendment and "compel" a neighboring state to raise its drinking age. The flaw in this argument is obvious - Congress has not enacted a law "compelling" a uniform 21 year drinking age. No amount of rhetoric can convert Section 158 into a federal "prohibition" or "compulsion".

B. Section 158 Is A Constitutional Exercise of Congress' Power to Advance An Important Federal Interest.

South Dakota has asserted that its statute permitting 19 and 20 year olds to consume low-point beer is a "core" interest entitled to strong protection under the Twenty-first Amendment and that Section 158 should be declared unconstitutional.

This Court has recently found that the federal interest in the preservation of a free economy under the antitrust laws clearly outweighs the interest of the State of New York in regulating the wholesale and retail price structure of beverage alcohol and the protection of small retailers.⁶² Although New York argued vigorously that the Twenty-first Amendment sheltered its statute, this Court struck it down. The power to regulate the pricing structure of beverage alcohol is without doubt as much a "core" power under the Twenty-first Amendment as the power to set a minimum drinking age. Section 158 does not require striking down a state law, but

⁶² Id., 324 Liquor Corp., 55 U.S.L.W. 4094.

merely offers a financial incentive to change it. Surely, if the federal interest in "the antitrust laws in general, and the Sherman Act in particular ... and the preservation of economic freedom and our free enterprise system..."⁶³ are important enough to override and nullify a New York statute, it should be clear that Section 158 should be sustained on the grounds that a federal interest in protecting life, health and property on the nation's highways outweighs South Dakota's interest in its drinking age statute. Any rational balancing process must clearly "kick the beam" in favor of

⁶³ Id. at 4098 (quoting United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972)).

preserving the federal statute against a South Dakota statute which legally may co-exist.

South Dakota and the Beer Wholesalers have asserted that South Dakota's statute is a temperance statute. Beer, whether low-alcohol or regular strength, is the overwhelming alcoholic beverage of choice for the youth of this nation⁶⁴ and to expand its availability to 19 and 20 year olds is not a temperance measure and no sophistry about gradually introducing youth to drinking can make it such. Perhaps South Dakota and the Beer

⁶⁴ Alexander C. Wagenaar, "Aggregate Beer and Wine Consumption Effects of Changes in the Minimum Legal Drinking Age and a Mandatory Beverage Container Deposit Law in Michigan", Journal of Studies on Alcoholism, Vol. 43, No. 5, 1982, 473.

Wholesalers believe that low-alcohol beer is inherently more benign than regular beer or other alcoholic beverages. This is not true. The amount of intoxication depends on the absolute amount of alcohol consumed, and 1-1/4 bottles (12 ounces per bottle) of low-alcohol beer is equivalent in alcohol to approximately one bottle of regular beer which in turn is equal to one shot (or 1-1/4 ounces) of whiskey or one glass (four ounces) of wine.⁶⁵ Thus, a six-pack of low-alcohol beer is equivalent to 4.8 shots of whiskey.

⁶⁵ Olson and Gerstein, Alcohol in America: Taking Action to Prevent Abuse (National Academy Press, Washington, D.C. 1985).

In Capital Cities⁶⁶ this Court held that a state prohibition of wine advertising on television was required to give way to the weightier federal interest in a "uniform national communications policy".⁶⁷ Part of this Court's reasoning was based on the fact that the prohibition applied selectively only to the single beverage wine whereas the state permitted advertising in all media for all other types of alcoholic beverages. The court found that the state's interest in prohibiting advertising involved temperance - long considered a "core" interest under the Twenty-first Amendment - but the court concluded that

⁶⁶ 467 U.S. 691.

⁶⁷ Id. at 714.

even in the case of a temperance statute, the State's interest was not as "substantive" as if it had been applied less selectively. Thus, even conceding hypothetically that South Dakota's statute involves a "temperance" interest, the South Dakota statute clearly would not enjoy any kind of absolute protection under the Twenty-first Amendment particularly under circumstances where the State has been so extremely selective in providing a single exception in favor of one beverage, low-alcohol beer, from its general 21 year age governing all other alcoholic beverages. As in Capital Cities, the federal interest under Section 158 in highway safety and preservation of life is overwhelmingly

greater than the narrow selective interest of South Dakota in providing a special drinking age exception for low-alcohol beer.

Finally, nothing in the record establishes what the interest is that South Dakota seeks to advance in providing that 19 and 20 year olds may consume low-alcohol beer. Unsubstantiated claims of state interest are entitled to very little, if any, weight. As this Court explained in Midcal, 445 U.S. at 113,

"We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns are not of the same stature as the goals of the Sherman Act." (Emphasis supplied)

CONCLUSION

For the reasons stated above, the decision below of the United States Court of Appeals for the 8th Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

The following is a list of names and a description of the Amici joining in this Brief:

The American Academy of Pediatrics is a non-profit Pan-American association of approximately 30,000 physicians certified in the specialized care of infants, children and adolescents. The AAP's principal purpose is to ensure the attainment by all children of their full potential for physical, emotional and social health.

American Council on Alcohol Problems is a non-profit corporation seeking long range solutions to the problems of alcohol and other drugs and working in

the fields of education and public policy.

American Medical Society on Alcoholism and Other Drug Dependencies (AMSAODD) is a national organization of 2,400 physicians who specialize in the area of prevention, diagnosis and treatment of alcoholism and other drug dependencies.

The American Public Health Association, founded in 1872, is the oldest and largest professional public health society in the world, with a combined national and affiliate membership of over 50,000 health professionals. Its goal is to protect and promote personal and environmental health.

Association of Alcoholism and Drug Abuse Counselors was founded in 1972, and is the only national organization that exists to represent more than 22,000 alcoholism and drug abuse counselors, who work in hospitals, treatment centers, private practice, councils and agencies on alcoholism and drug abuse, and employee assistance programs.

The Association of Teachers of Preventive Medicine, founded in 1941, is an academic specialty society composed of faculty and academic units in medical schools that teach preventive medicine. The Association has a history of involvement in issues concerned with automotive safety.

The Center for Science in the Public Interest, founded in 1971, is a non-profit advocacy organization with 80,000 members nationwide and is principally engaged in efforts to improve governmental and industry policies and practices that affect the health of Americans. The Center's alcohol policies project promotes a variety of prevention policies designed to change public attitudes about alcohol and to reduce alcohol problems in the United States.

Candy Lightner, the founder of Mothers Against Drunk Driving, led the national movement to raise the drinking age to 21.

Legal Action Center is a not-for-profit public interest firm whose primary

mission is to improve our nation's efforts to combat alcoholism and drug addiction and crime. The Center works with alcohol and drug abuse and criminal justice service providers as well as with recovered alcohol and drug abusers - throughout the nation.

The National Congress of Parents and Teachers (PTA) is a nationwide organization with a current membership of over 8.5 million parents, teachers and concerned citizens. The primary purpose of the National PTA is to promote the welfare of children and youths at home, in schools, and in the community.

The National Federation of Parents for Drug Free Youth (NFP), founded in May, 1980, is a non-profit organization

committed to raising a generation of drug free youth. Its principal objective is to assist in the formation and support of local parent and youth groups in communities across America to eliminate drug and alcohol use among youth.

Remove Intoxicated Drivers, founded in 1978, RID is the oldest community-based anti-drinking and driving organization and has established 132 chapters in 32 states.

The South Dakota Public Health Association, founded in 1952, is an interdisciplinary society of professional public health workers and others interested in the problems and issues of public health in South Dakota. A primary goal of the Association is to define and

influence health policies, actions and legislation which affect the health and well being of South Dakotans.

AMICUS CURIAE

BRIEF

MAR 14 1987

JOSEPH F. SPANOL, JR.
CLERKIN THE
Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF SOUTH DAKOTA,

Petitioner,

vs.

THE HONORABLE ELIZABETH H. DOLE, SECRE-
TARY, UNITED STATES DEPARTMENT OF
TRANSPORTATION, IN HER OFFICIAL CAPACITY,*Respondent.*On Writ of Certiorari to the United States Court of
Appeals for the Eighth Circuit**BRIEF OF AMICI CURIAE UNITED STATES SENATOR
FRANK R. LAUTENBERG AND MOTHERS AGAINST
DRUNK DRIVING IN SUPPORT OF RESPONDENT**THOMAS F. CAMPION
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Against Drunk Driving*

217 pp

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Interest of the <i>Amici Curiae</i>	1
ARGUMENT:	
The Surface Transportation Assistance Act does not violate either the Tenth or Twenty- first Amendments to the United States Con- stitution	2
I. The Act does not violate the Tenth Amend- ment	2
II. The Act does not violate the Twenty-first Amendment	8
A. There is no conflict between the Act and Twenty-first Amendment	9
B. Even if there were a conflict between the Act and the Twenty-first Amend- ment, the federal policy of saving lives outweighs the policies advanced by the State	16
Conclusion	20

TABLE OF AUTHORITIES

PAGE

Cases Cited

<i>324 Liquor Corp. v. Duffy</i> , 107 S. Ct. 720 (1987)	9, 10, 14, 16, 17
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984) ..	13, 14
<i>California v. LaRue</i> , 409 U.S. 109 (1972)	14
<i>California Retail Liquor Dealers Association v. Mid-</i> <i>cal Aluminum</i> , 445 U.S. 97 (1980)	13, 16
<i>Capital Cities, Inc. v. Crisp</i> , 467 U.S. 691 (1984)	9, 17
<i>Collins v. Yosemite Park Co.</i> , 304 U.S. 518 (1938) ..	10
<i>Craig v. Boren</i> , 429 U.S. 190 (1926)	9, 16, 17
<i>Department of Revenue v. James Beam Co.</i> , 377 U.S. 341 (1964)	9
<i>Joseph S. Finck & Co. v. McKittrick</i> , 305 U.S. 395 (1939)	8, 9
<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1980)	3
<i>Harris v. McRae</i> , 448 U.S. 297 (1980)	13
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TABLE OF AUTHORITIES

PAGE

<i>New York State Liquor Authority v. Bellanca</i> , 452 U.S. 714 (1981)	10, 14
<i>Oklahoma v. United States Civil Service Commission</i> , 330 U.S. 127 (1947)	3, 18
<i>Pennhurst State School v. Halderman</i> , 451 U.S. 1 (1981)	3, 8, 13, 18
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971)	9
<i>Ziffrin, Inc. v. Reeves</i> , 308 U.S. 132 (1939)	8

United States Constitution Cited

Article I § 8 cl. 1	2, 9
Article I § 10 cl. 2	9
Amendment I	9, 16, 17
Amendment X	2, 8
Amendment XIV	9, 16, 17
Amendment XXI	2, 8-12, 14-17

Statute Cited

23 U.S.C. § 158 (Supp. 1986)	2
------------------------------------	---

TABLE OF AUTHORITIES

PAGE

Legislative History and Other Sources Cited1933 *Cong. Rec.*:

S4228	13,
	14

1984 *Cong. Rec.*:

S691	4
S1078	4-6,
	15, 16
S8207	3
S8209	4-7,
	11, 15

1985 *Cong. Rec.*:

S9429	3,
	4, 7
S9430	14
S15202	7,
	8, 17

D. Berger and J. Snortum, <i>Alcoholic Beverage Preferences of Drinking—Driving Violators</i> , 46 <i>Journal of Studies on Alcohol</i> 232 (May 1985)	19
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--	---

TABLE OF AUTHORITIES

PAGE

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	19

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	7, 11, 15

A. Williams and P. Zador, <i>The Effect of Raising the Legal Minimum Drinking Age on Fatal Crash Involvement</i> , Insurance Institute for Highway Safety (Sept. 1981)	5
--	---

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	15

No. 86-260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF SOUTH DAKOTA,

Petitioner,

vs.

THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF
TRANSPORTATION, IN HER OFFICIAL CAPACITY,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Eighth Circuit

**BRIEF OF *AMICI CURIAE* UNITED STATES SENATOR
FRANK R. LAUTENBERG AND MOTHERS AGAINST
DRUNK DRIVING IN SUPPORT OF RESPONDENT**

Interest of the *Amici Curiae*

United States Senator Frank R. Lautenberg and
Mothers Against Drunk Driving respectfully submit this

amici curiae brief in support of the respondent, the Honorable Elizabeth H. Dole, Secretary, United States Department of Transportation, in her official capacity. Senator Lautenberg introduced to Congress the bill which, since its enactment in 1984, has become the Surface Transportation Assistance Act, 23 U.S.C. § 158 (Supp. 1986). This case concerns the constitutionality of that Act.

Mothers Against Drunk Driving ("MADD") is a national organization of 600,000 members and supporters. It was founded to combat drunk-driving and to advocate corresponding public policy that reduces the incidence and effects of drunk-driving. This case involves such public policy.

ARGUMENT

The Surface Transportation Assistance Act does not violate either the Tenth or Twenty-first Amendments to the United States Constitution.

I. The Act does not violate the Tenth Amendment.

The State of South Dakota has alleged that by conditioning the receipt of 5 or 10 percent of the allocated federal highway funds upon the states setting their minimum drinking ages at age 21, the Surface Transportation Assistance Act ("STAA" or "Act") unduly encroaches upon the powers reserved to the states under the Tenth Amendment. This allegation is without merit.

Tenth Amendment challenges of this type are not new to this Court. Pursuant to its powers under the Spending Clause, U.S. Const. art. I, § 8, cl. 1, Congress has frequently

conditioned the receipt of federal moneys upon compliance by the recipient with federal statutory directives. *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); see also *Pennhurst State School v. Halderman*, 451 U.S. 1, 22 (1981) (referring to a similar act as a "typical funding statute"). This Court has repeatedly upheld Congress' attachment of "strings" to federal moneys to induce state governments to cooperate voluntarily with federal policies. *Fullilove v. Klutznick*, 448 U.S. at 474; see also *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 144 (1947). However, the attachment of "strings" has been permitted only where (1) the policy promoted by Congress benefits the general welfare; and (2) the means employed by Congress are reasonably related to achieving this end. See *Fullilove v. Klutznick*, 448 U.S. at 473; *Oklahoma v. United States Civil Service Commission*, 330 U.S. at 144. The real question, then, is whether the general welfare will indeed be benefited by conditioning the receipt of 5 or 10 percent of the allocated federal highway funds on the states setting their minimum drinking age at age 21. The answer is yes. An examination of the legislative history of the Surface Transportation Assistance Act demonstrates the Act's beneficial impact upon the general welfare.

STAA was approved by Congress as a result of its concern with the "loss of lives and the frequency of crippling injuries which result from alcohol-related accidents involving those 16 to 21 years of age". 1985 *Cong. Rec.* S9429 (daily ed. July 11, 1985) (statement of Sen. Lautenberg). The studies presented to Congress all reached the same conclusion: drunk driving accidents are responsible for more than 50 percent of the 45,000 deaths in traffic accidents in America each year. 1984 *Cong. Rec.* S8207 (daily ed. June 26, 1984) (statement of the Presiding

Officer); see also National Highway Traffic Safety Administration, *Alcohol in Fatal Accidents: National Estimates—USA* (Jan. 1983).

As noted throughout the legislative history of the Act, drunk driving is the leading killer of teenagers in America, 1984 *Cong. Rec.* S691 (daily ed. Feb. 1 1984) (statement of Sen. Lautenberg), and actually accounts for about 50 percent of all teenage deaths, 1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984) (statement of Sen. Lautenberg). As a result of drunk driving, the life expectancy of American teenagers has remained constant for the last 20 years—even though the life expectancies for all other age groups have improved, 1985 *Cong. Rec.* S9429 (daily ed. July 11, 1985) (statement of Sen. Lautenberg).

Such alarming statistics justifiably caused Congress to become concerned. Congress became even more concerned when additional studies were conducted on both a national and state-wide basis, and virtually all of such studies disclosed a direct correlation between minimum drinking ages below age 21 and higher accident rates. See, e.g., 1984 *Cong. Rec.* S1078 (daily ed. Feb. 7, 1984) (statement of Sen. Lautenberg).

The National Transportation Safety Board, in a report dated July, 1982, recommended that the minimum drinking age be raised to age 21, 1984 *Cong. Rec.* S1078 (daily ed. 1984) (statement of Sen. Lautenberg).¹ In addition, in eight out of nine states studied by the Insurance Institute for Highway Safety, the Institute found that a minimum drinking age of age 21 would result in a 28% reduction in

¹ Citing United States Department of Transportation *Fatal Accident Reporting System 1982*, DOT HS 806 566 (May, 1984).

alcohol-related accidents, 1984 *Cong. Rec.* S1078 (daily ed. 1984) (statement of Sen. Lautenberg).² Further, a study conducted by the President's Commission on Drunk Driving recommended that the states raise their minimum drinking ages to age 21, 1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984) (statement of Sen. Lautenberg).³ If all states raised their minimum drinking ages to age 21, the National Safety Board estimated that at least 1,250 lives could be saved annually, 1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984) (statement of Sen. Lautenberg).⁴

State-wide surveys reinforced the conclusion that there is a direct correlation between higher accident rates and minimum drinking ages under age 21. See, e.g., 1984 *Cong. Rec.* S1078 (daily ed. Feb. 7, 1984) (statement of Sen. Lautenberg); see also T. Williams and R. Lillis, *The Relative Role of Alcohol as A Contributing Factor in the Overrepresentation of Young Drivers in Highway Crashes*, New York State Division of Alcoholism and Alcohol Abuse, Bureau of Alcohol & Traffic Safety (Res. Report No. 6) (Fall, 1984).

Two studies were summarized by Senator Lautenberg:

In July, 1974, the State of Virginia lowered its legal drinking age to 18. In 1973, there were 1,900

² Citing A. Williams and P. Zador, *The Effect of Raising the Legal Minimum Drinking Age on Fatal Crash Involvement*, Insurance Institute for Highway Safety (Sept. 1981).

³ Citing *Presidential Commission on Drunk Driving—Final Report* (Nov. 1983).

⁴ See also National Highway Traffic Safety Administration, *Fatality Trends: Victim Age* (Nov./Dec. 1983).

alcohol-related crashes involving 16 to 20-year olds. In 1974, there were 2,600, an increase of 36 percent. In 1979, there were 4,300 such crashes, an increase of 215 percent.

• • •

When New Jersey lowered its drinking age in 1974, the death rate due to drunk driving among those in the 16 to 20-year old group tripled. Since raising its drinking age to 21 in 1983, New Jersey has cut those fatalities in half.

1984 *Cong. Rec.* S1078 (daily ed. Feb. 7, 1984) (statement of Sen. Lautenberg); 1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984 (statement of Sen. Lautenberg), respectively.

These statistics and studies convinced Congress that many unnecessary deaths were caused each year by drunk driving. Congress sought to reduce the number of drunk driving-related deaths by enacting STAA. It is undeniable that the policy of saving lives embodied in STAA benefits the general welfare. Moreover, as the legislative history of the Act indicates, the means resorted to by Congress in promoting its policy are reasonably related to accomplishing this end.

As a result of both the high death rates among teenagers and the direct relationship between teenage deaths and lower drinking ages, Congress sought to promote a policy which would reduce the number of teenage deaths resulting from drunk driving. Accordingly, the President's Commission on Drunk Driving recommended to the states that they raise their respective minimum drinking ages to age 21. 1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984)

(statement of Sen. Lautenberg).⁶ In the first year after this recommendation was made, only 4 states out of the 23 at that time with minimum drinking ages below age 21 chose to raise their minimum drinking ages. 1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984) (statement of Sen. Lautenberg). Clearly, that recommendation was an insufficient means of promoting Congress' policy. As a result, Congress resorted to more forceful and direct means of promoting its policy of saving lives, i.e., by withholding federal moneys from the states.

As the legislative history of the Act indicates, the only method by which Congress could encourage states to increase their respective drinking ages was by withholding federal moneys. *See Id.* Accordingly, on June 26, 1984, Congress passed the initial version of the Surface Transportation Assistance Act. That version of the Act limited the withholding of federal highway funds to a period of 2 years. 1985 *Cong. Rec.* S9429 (daily ed. July 11, 1985) (statement of Sen. Lautenberg).

Prior to the passage of the initial version of the Act, twenty-seven states had minimum drinking ages below age 21. Although the passage of the initial version of the Act prompted 14 states to increase their drinking ages to age 21, it nevertheless brought the total to only 37 states. 1985 *Cong. Rec.* S15202 (daily ed. Nov. 12, 1985) (statement of Sen. Lautenberg). Because thirteen states and the District of Columbia refused to raise their minimum drinking ages, and because Congress feared that many of the states that chose to raise their drinking ages did so only for the

⁶ Citing *Presidential Commission on Drunk Driving—Final Report* (Nov. 1983).

two-year duration of the Act, Congress clearly saw the need for more stringent means of promoting its policy objective. *Id.* In fact, some states adopted 21 year old minimum drinking age statutes that would sunset simultaneously with the federal provision. 1985 *Cong. Rec.* S15202 (daily ed. Nov. 12, 1985) (statement of Sen. Lautenberg, referring specifically to the minimum drinking age laws at that time of Kansas and Texas.) STAA, as amended, which permanently withholds 5 or 10 percent of federal highway funds from states that do not raise their minimum drinking ages to age 21, provides the incentive for more states to raise their drinking ages.

Since Congress clearly has the power to fix the terms upon which it disburses federal moneys to the states, *Pennhurst States School v. Halderman*, 451 U.S. at 17, and since the means by which it has effectuated its policy of saving lives are reasonably related to this end, STAA cannot be held to violate the Tenth Amendment.

II. The Act does not violate the Twenty-first Amendment

The State of South Dakota has alleged that STAA violates the Twenty-first Amendment because it attempts to regulate the delivery or use of alcohol, a power allegedly reserved exclusively to the states under that Amendment. This allegation is without merit.

Immediately after the ratification of the Twenty-first Amendment, this Court recognized that the language of Section 2 of that Amendment conferred broad power on the states to regulate the use of liquor within their boundaries. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), *Joseph S. Finck & Co. v. McKittrick*, 305 U.S. 395, 398

(1939). More recently, however, this Court has been asked to examine the extent of the states' powers, particularly when conflicts between state and federal policies are involved. *See, e.g.* 324 *Liquor Corp. v. Duffy*, 107 S. Ct. 720 (1987); *Capital Cities, Inc. v. Crisp*, 467 U.S. 691 (1984). In conducting such examinations, this Court has determined that while the Twenty-first Amendment powers are indeed broad, they are circumscribed by other provisions of the Constitution. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (Establishment Clause); *Craig v. Boren*, 429 U.S. 190, 204-209 (1976) (Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (Procedural Due Process); *Department of Revenue v. James Beam Co.*, 377 U.S. 341, 345-46 (1964) (Export-Import Clause). Today, the Court is asked by petitioners to determine to what extent, if any, the Spending Clause of the Constitution, art. I, § 8, cl. 1, also circumscribes the states' powers under the Twenty-first Amendment.

Before reaching the merits of this question, however, the Court must first determine whether the Twenty-first Amendment actually conflicts with STAA.

A. There is no conflict between the Act and the Twenty-first Amendment

Section 2 of the Twenty-first Amendment provides:

The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited. (Emphasis added)

As the Amendment clearly states and as this Court has repeatedly recognized, the Twenty-first Amendment was designed to give the states "virtually complete control" over delivery or use of alcohol *within their borders*. See, e.g. *324 Liquor Corp. v. Duffy*, 107 S. Ct. at 726 ("Section 2 of the Twenty-first Amendment reserves to the States the power to regulate. . . intoxicating liquor *within their borders*.") (emphasis added); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1981) ("This Court has long recognized that a state has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor *within its boundaries*.") (emphasis added).

Congress' purpose in enacting STAA was not to regulate the delivery or use of intoxicating liquors solely *within* any single state's borders. Rather, Congress intended to regulate the *passage* of alcoholic beverages *across state boundaries*, that is, from those states with minimum drinking ages under age 21 to their neighboring states with minimum drinking ages of age 21. This *passage* of alcoholic beverages from state to state does not fall within the "for use therein" requirement of the Twenty-first Amendment, nor within this Court's interpretation of that language. U.S. Const. Amend. XXI; see *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 337 U.S. at 332, citing *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938), in which this Court stated that liquor shipped through a state but "destined for distribution and consumption" elsewhere does not fall within the meaning of the "for delivery or use therein" clause of the Twenty-first Amendment. The passage of alcohol from state-to-state is a national problem not governed by the Twenty-first Amendment.

While it cannot be denied that the adoption of a national minimum drinking age by Congress affects consumption within individual states, such effect is only incidental to Congressional intent to influence a cross-state problem.

The lack of uniformity of the minimum drinking ages of bordering states has created the problem of "blood borders," or teenagers who drive from the states in which they reside where they are not permitted to drink, to neighboring states where they are allowed to drink. This problem was well recognized by Congress. As Senator Lautenberg, quoting the November 1983 report of the President's Commission on Drunk Driving stated:

The lack of uniformity among the State laws is especially critical regarding the minimum legal drinking age because an incentive to drink and drive is established due to young persons commuting to border states where the drinking age is lower.

1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984) (statement of Sen. Lautenberg, quoting *Presidential Commission on Drunk Driving—Final Report* (Nov. 1983)). Indeed, those states with minimum drinking ages below age 21 have freely permitted teenagers of neighboring states to purchase and/or consume alcohol therein. The consequences are dire. These teenagers then either drive home while intoxicated, or drive around while becoming intoxicated. The states in which young people are being killed as a result of drunk driving have no recourse against bordering states which continue to sell alcohol to their teenagers. It is a problem that demanded a federal

solution. In essence, and contrary to South Dakota's assertions, a single state's minimum drinking age knows no boundaries.

That liquor is sold *within* South Dakota and *within* other states with lower drinking ages is conceded. However, that is of no consequence. As this Court has recognized, the primary issue is not whether liquor is being sold within a state's boundaries. See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. at 333-34. Rather, for Twenty-first Amendment purposes, it is where the liquor will ultimately be delivered or used which is determinative. *Id.* The ultimate delivery or use of a portion of that liquor and of its lethal intoxicating effects is in neighboring states where teenagers are not permitted to purchase liquor. It is the delivery of liquor across state borders which Congress seeks to reduce. "Blood borders" is not a situation which affects states individually. It affects the nation as a whole. The Twenty-first Amendment, by its own language and by this Court's interpretation of such language, applies only to the use of alcoholic beverages within a state's own boundaries. Therefore, it does not apply to the Surface Transportation Assistance Act.

The Twenty-first Amendment is also inapplicable for a second reason. For the Amendment to apply, there must be a federal law which violates a state law protected thereunder. U.S. Const. Amend. XXI. STAA clearly does not "violate" any state's law because it merely *encourages* states to narrow the scope of their own minimum drinking age laws.

As this Court has recognized there is a "well-settled distinction between Congressional 'encourage-

ment' of State programs and the imposition of binding obligations on the States." *Pennhurst State School v. Halderman*, 451 U.S. 1, 27 (1981); see also *Harris v. McRae*, 448 U.S. 297, 325 (1980). The Act merely *encourages* states with laws setting the minimum drinking age below age 21 to narrow the scope of their own laws. In drafting the Act, Congress was clearly aware of the need for reducing the number of deaths caused by teenage drunk driving, and plainly understood the difference between encouraging state action in that direction and mandating it. See *Pennhurst State School v. Halderman*, 451 U.S. at 27. *But cf.* H.R. 3807 (Rep. Florio) (98th Cong.) (mandating 21 year old minimum drinking age for alcoholic beverages). Since the final determination as to what the minimum drinking age should be remains with each state, there is clearly no "violation" of the state's minimum drinking age laws.

Finally, Congress' encouragement of a uniform minimum drinking age of age 21 serves, rather than violates, the policy underlying the Twenty-first Amendment. It seems clear that the Amendment was intended, among other things, to promote temperance.⁶ 1933 *Cong. Rec.* S4228 (daily ed. Feb. 16, 1933) *Cong. Rec.* S4228 (daily ed. Feb. 16, 1933) (statement of Sen. Bingham); see also *Bacchus Im-*

⁶ Members of this Court have disagreed over whether the legislative history of the Amendment serves to delineate Congress' degree of control over the regulation of liquor. See, e.g. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274 (1984); *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97, 107 n.10 (1980) in which this Court dismissed the legislative history as "obscure" and thus unworthy of analysis.

(Footnote continued on following page)

ports Ltd. v. Dias, 468 U.S. at 276. In keeping with this policy, this Court has upheld the actions of states under the Twenty-first Amendment when they have attempted to minimize the well-known evils associated with alcohol. See, e.g., *California v. LaRue*, 409 U.S. 109 (1972); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981). By contrast, when the state's provisions were not designed to promote temperance, this Court has repeatedly alerted others to that fact in denying Twenty-first Amendment protection. See, e.g., *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. at 112-114; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

As Congress has noted, permitting teenagers to drink in bordering states and not in their own state encourages teenagers to drive across state lines in order to obtain alcohol. See 1985 *Cong. Rec.* S9430 (daily ed. July 11, 1985) (statement of Sen. Danforth). According to the President's Commission on Drunk Driving, "[t]here is simply no way to adequately address the needless tragedies caused by young persons commuting to border states except by establishing a uniform drinking age among the states." 1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984) (statement of Sen. Lautenberg). Moreover, studies con-

(Footnote continued from preceding page)

But cf. 324 *Liquor Corp. v. Duffy*, 107 S. Ct. at 730 (dissent of Justice O'Connor, joined by Chief Justice Rehnquist). Despite this potential obscurity in the legislative history, the history clearly demonstrates that the Twenty-first Amendment was designed to promote temperance. 1933 *Cong. Rec.* S4228 (daily ed. Feb. 16, 1933) (statement of Sen. Bingham).

ducted on a national and state-wide basis all reached the same conclusion: lowering the minimum drinking age causes an increased number of deaths among American teenagers. See e.g., 1984 *Cong. Rec.* S1078 (daily ed. Feb. 7 1984) (statement of Sen. Lautenberg⁷; 1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984) (statement of Sen. Lautenberg).⁸

Since studies overwhelmingly show a direct correlation between drinking ages and accident rates, see, e.g. 1984 *Cong. Rec.* S1078 (daily ed. Feb. 7, 1984) (statement of Sen. Lautenberg); 1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984) (statement of Sen. Lautenberg), contrary to South Dakota's contention, state laws which permit those under age 21 to drink liquor cannot be viewed as temperance measures. Even if somehow they could be so viewed, the fact remains that STAA, which encourages decreasing the availability of all alcoholic beverages to those under age 21, clearly promotes temperance. The Act, therefore, is in concert with, rather than in violation of, the Twenty-first Amendment's purpose.

⁷ Citing United States Department of Transportation, *Fatal Accident Reporting System*, 1982, DOT HS 806 556 (May 1984).

⁸ Citing *Presidential Commission on Drunk Driving—Final Report* (Nov. 1983).

B. Even if there were a conflict between the Act and the Twenty-first Amendment, the federal policy of saving lives outweighs the policies advanced by the State.

If this Court should find a conflict between the Surface Transportation Assistance Act and the Twenty-first Amendment, then it must determine whether the Spending Clause grants Congress the power to adopt the Act despite the conflict. In cases involving clauses other than the Spending Clause, this Court has clearly circumscribed the states' Twenty-first Amendment powers. *See, e.g., Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (Establishment Clause)⁹; *Craig v. Boren*, 429 U.S. 190, 204-209 (1976) (Equal Protection Clause).¹⁰ In doing so, the Court has attempted to "harmonize state and federal powers." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980); *324 Liquor Corp. v. Duffy*, 107 S. Ct. at 727. In weighing federal and state conflicting policies, the Court must decide whether STAA conflicts with the Twenty-first Amendment and, if so, whether STAA may nevertheless prevail over competing state interests. As shown below, STAA will save lives. South Dakota has made no showing that its minimum drinking age law will serve the same

⁹ The Court struck down as violative of the Establishment Clause a state statute restricting the sale of liquor in church or school districts. *Id.* at 122.

¹⁰ The Court struck down as violative of the Equal Protection Clause a state statute forbidding women under age 18 and men under age 21 from purchasing or consuming liquor in that state. *Id.* at 204-205.

purpose. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

In recent years, this Court has seen fit to balance federal and state policies when both policies were at least arguably protected by the Constitution. For example, in *Larkin v. Grendel's Den, Inc.*, 459 U.S. at 122 n.5, this Court balanced First Amendment rights against state rights under the Twenty-first Amendment. This Court found that the rights granted to individuals under the Establishment Clause outweighed the Twenty-first Amendment right of the state to control the sale of liquor within its borders. Similarly, in *Craig v. Boren*, 429 U.S. 190 (1976), this Court balanced Fourteenth Amendment rights against state rights under the Twenty-first Amendment. This Court found that the right to equal protection outweighed the Twenty-first Amendment right of the state to regulate the sale of alcohol within its borders.¹¹

Clearly, both the First and Fourteenth Amendments contain rights of utmost importance to Americans. Of at least equal importance with these rights is the right to remain alive. It is that constitutional right which Congress seeks to promote by means of STAA.

Studies have shown that the policy promoted by Congress under its Spending Clause powers will save over 1,000 lives per year. 1985 *Cong. Rec.* S15202 (daily ed. Nov. 12, 1985) (statement of Sen. Lautenberg). On the other

¹¹ *See also 324 Liquor Corp. v. Duffy*, 107 S. Ct. 720 in which this Court balanced Congress' power under the Commerce Clause against states' rights under Twenty-first Amendment. This Court found that the right to regulate trade outweighed the right of the state to regulate the sale of liquor within its borders.

hand, South Dakota has argued that its minimum drinking age of 19 (1) protects the interests of federalism; and (2) saves lives by encouraging teenagers to drink in moderation. There has been no showing by South Dakota that either policy would be advanced by overturning STAA.

The interests of federalism are in no way advanced by denying Congress the powers which it rightfully has under the Constitution. This Court has long recognized that Congress may fix the terms on which it shall disburse federal moneys to the States. *Pennhurst State School v. Halderman*, 451 U.S. at 17; *Oklahoma v. United States Civil Service Commission*, 330 U.S. at 143. South Dakota's argument presupposes that Congress is taking something away from it to which it is rightfully entitled. That claim is groundless. The right of a state to receive federal grants or aid results from Congressional enactments which explicitly give them that right. See *Oklahoma v. United States Civil Service Commission*, 330 U.S. at 136. Moreover, Congress has the power either to withdraw such grants before any funds are paid or to attach conditions to the rights of states to receive the allocated funds. *Id.* Under STAA, Congress attached conditions to its allocation of federal highway funds in order to save lives. By attaching such conditions to the states' receipt of federal highway funds, Congress was merely doing what it has the power to do. Overturning the Surface Transportation Assistance Act would thus defeat rather than promote federalism.

South Dakota has also claimed that allowing those under age 21 to drink promotes the policy of saving lives by

"controlling youthful drinking". (Petitioner's brief at 62). Although South Dakota points to several studies in support of this contention, the overwhelming evidence, as evidenced throughout the legislative history of the Act, demonstrates that there is a direct correlation between higher accident rates and minimum drinking ages under age 21.¹² See, e.g., 1984 *Cong. Rec.* S1078 (daily ed. Feb. 7, 1984) (statement of Sen. Lautenberg). Indeed, South Dakota has failed to present evidence from its own state showing that its lower minimum drinking age has saved lives.

By contrast, STAA is designed to save over a thousand lives per year. 1984 *Cong. Rec.* S8209 (daily ed. June 26, 1984) (statement of Sen. Lautenberg).¹³ Indeed, 77 percent of all Americans, including 58% of those 16 to 20 years old, approved of age 21 as the national minimum drinking age. 1984 *Cong. Rec.* S1078 (daily ed. Feb. 7, 1984) (statement of Sen. Lautenberg, quoting a Gallup poll survey). Since South Dakota has failed to demonstrate how overturning STAA would either promote federalism or save lives, and since Congress has shown that STAA is intended to save thousands of lives per year, the federal policy advanced clearly outweighs any interest of South Dakota under the Twenty-first Amendment.

¹² Indeed, at least one study indicates that those individuals who drink beer rather than alcoholic beverages "were more likely to drive after drinking and tended to consider driving while intoxicated to be less serious." D. Berger and J. Snortum, *Alcoholic Beverage Preferences of Drinking—Driving Violators*, 46 *Journal of Studies on Alcohol* 232, 232-239 (May 1985).

¹³ See also National Highway Traffic Safety Administration, *Fatality Trends; Victims Age* (Nov./Dec. 1983).

CONCLUSION

Thousands of American men and women between the ages of 18 and 21 are killed or seriously injured each year in drunk-driving related accidents on our nation's highways. Congress has fashioned a humane and constitutional response. As a result, many lives have been and will continue to be spared. It is respectfully submitted that the Court deny petitioner's claim that the Surface Transportation Assistance Act is unconstitutional.

Respectfully Submitted,

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Dated: March 16, 1987

AMICUS CURIAE

BRIEF

MAR 16 1987

JOSEPH F. SPANIOL, JR.
CLERKIN THE
Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF SOUTH DAKOTA
Petitioner,
v.THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
IN HER OFFICIAL CAPACITY,
*Respondent.*On Writ of Certiorari to the United States
Court of Appeals
For The Eighth Circuit**BRIEF OF AMICI CURIAE
INSURANCE INSTITUTE FOR HIGHWAY SAFETY
THE AETNA LIFE AND CASUALTY
THE ALLIANCE OF AMERICAN INSURERS
ALLSTATE INSURANCE COMPANY
THE AMERICAN INSURANCE ASSOCIATION
THE CONTINENTAL INSURANCE COMPANY
GOVERNMENT EMPLOYEES INSURANCE COMPANY
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS
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2298

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. RAISING THE MINIMUM ALCOHOL PURCHASE AGE REDUCES FATAL AUTOMOBILE CRASHES INVOLVING YOUTHFUL DRIVERS	3
A. Scientific Studies Show Raising the Alcohol Purchase Age Reduces Highway Fatalities	5
B. Petitioner's Studies Are Analytically Unsound	8
II. YOUTHFUL INVOLVEMENT IN ALCOHOL-RELATED MOTOR VEHICLE CRASHES IS A NATIONAL PROBLEM REQUIRING FEDERAL ACTION	12
CONCLUSION	14

TABLE OF AUTHORITIES

	<u>Page</u>
STATUTES	
Highway Safety Act of 1966, 23 U.S.C. §§ 401 <i>et seq.</i>	13
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	<u>Page</u>
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	<u>Page</u>
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	<u>Page</u>
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-260

THE STATE OF SOUTH DAKOTA
Petitioner,

v.

THE HONORABLE ELIZABETH H. DOLE, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals
For The Eighth Circuit

BRIEF OF AMICI CURIAE
INSURANCE INSTITUTE FOR HIGHWAY SAFETY
THE AETNA LIFE AND CASUALTY
THE ALLIANCE OF AMERICAN INSURERS
ALLSTATE INSURANCE COMPANY
THE AMERICAN INSURANCE ASSOCIATION
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NATIONAL ASSOCIATION OF INDEPENDENT INSURERS
PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY
NATIONWIDE MUTUAL INSURANCE COMPANY
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
UNITED SERVICES AUTOMOBILE ASSOCIATION

In Support of Respondent

INTEREST OF AMICI CURIAE

The Insurance Institute for Highway Safety, a nonprofit research and communications organization that has for many years worked to identify and develop ways of reducing motor

vehicle crash losses—deaths, injuries, and property losses—submits this brief amicus curiae in support of respondent, Secretary of Transportation.

The Insurance Institute is supported by the principal property and casualty insurance trade associations and a number of individual insurance companies. The research program of the Institute covers all facets of the highway loss problem, including human, environmental, and engineering factors. Institute research findings and publications are cited by academic, government, business, and other private sector organizations concerned with transportation safety both in the United States and abroad.

The individual insurance companies and insurance trade associations on this brief have an economic and humanitarian interest in developing and implementing countermeasures to reduce the toll in human life and suffering paid in crashes on the nation's highways.

Alcohol use and the part it plays in contributing to highway losses, especially among youthful drivers, is the subject of a considerable body of research by the Institute and others. The effect of laws establishing various minimum alcohol purchase ages on reducing crashes and saving lives is a major focus of this research. The Institute pioneered the investigation of the relationship between these laws and highway safety. Experience in states with 21 alcohol purchase age laws demonstrates that a national minimum drinking age of 21 for all alcoholic beverages is a proper and effective means of reducing the carnage on the highways caused by young, alcohol-impaired drivers.

SUMMARY OF ARGUMENT

Every year more than 22,000 people die on the highways in alcohol-related crashes. The suffering and loss of life from serious injuries among teenagers, who have the highest fatality rate per licensed driver of all age groups, is one particularly significant and tragic element of this complex and multifaceted problem. Inexperienced drivers can least afford to drive with

their behind-the-wheel performance impaired by alcohol. Research has demonstrated that raising the minimum alcohol purchase age reduces crash fatalities among young people; that the effects of these changes do not dissipate over time; and that increasing the minimum alcohol purchase age does not increase injuries or fatalities among any other age group.

Federal legislation is appropriate because inconsistent state laws invite young people to cross state lines to take advantage of lower alcohol purchase ages, thereby compromising the safety of highway users on both sides of the border. The Twenty-First Amendment should not be construed to grant one state the right to exercise its prerogatives over alcohol in such a manner as to impair another state's prerogative.

ARGUMENT

I. RAISING THE MINIMUM ALCOHOL PURCHASE AGE REDUCES FATAL AUTOMOBILE CRASHES INVOLVING YOUTHFUL DRIVERS

Motor vehicle crashes account for more than 40 percent of all deaths of people in their late teens and early twenties.¹ The combination of drinking and driving is one of the reasons the number is so high. Although studies have shown that teenagers drink and drive less often than older drivers,² their crash risk is higher than that of older drivers when they do drink and drive.³ Drivers between 18 and 20 exceed all other age groups

¹ S. P. Baker, B. O'Neill, and R. S. Karpf, *The Injury Fact Book*, Lexington Books, D.C. Heath and Company, Lexington, MA (1984).

² R. Farra, T. B. Malone, and H. Lilliefors, *A Comparison of Alcohol Involvement in Exposed and Impaired Drivers (Phases I and II, Technical Report)*, U.S. Department of Transportation, National Highway Traffic Safety Administration, Washington, D.C. (1976); A. C. Wolfe, *Characteristics of Alcohol Impaired Drivers*, SAE Paper 750878, Society of Automotive Engineers, Warrendale, PA (1975).

³ R. F. Borkenstein, R. F. Crowther, R. P. Shumate, W. B. Zeil, and R. Zylman, *The Role of the Drinking Driver in Traffic Accidents*, Indiana University, Department of Police Administration, Bloomington, IN (1964); D. R. Mayhew, R. A. Warren, H. M. Simpson, and G. C. Haas, *Young Driver Accidents: Magnitude and Characteristics of the Problem*, Traffic Injury Research Foundation, Ottawa, Ontario, Canada (1981).

in alcohol-associated fatal crash involvement⁴ per licensed driver.⁵

In 1971, the Twenty-Sixth Amendment to the United States Constitution reduced the voting age in federal elections from 21 to 18. The states also reduced the voting age to 18, and in many states other so-called adult rights, including those pertaining to alcoholic beverages, were extended to persons less than 21 years old. Studies show that reducing the alcohol purchase age led to increases in alcohol-related crashes, both among those directly affected by the legislation (i.e., 18- to 20-year-olds) and to a lesser extent among younger drivers ages 16 and 17.⁶

The law under review in this case, enacted in 1984, created a mechanism to encourage states to adopt a uniform alcohol purchase age of 21. It requires the Secretary of Transportation to withhold 5 percent of federal highway aid from states not having a purchase age of 21 for all alcoholic beverages by October 1, 1986 and to withhold 10 percent in the following year. Many states that previously had raised the age to 19 or 20, as well as those that had retained an 18-year-old purchase age, raised the purchase age to 21. As of January 1, 1987, 44 states were in compliance with the federal policy.⁷

⁴ "Alcohol-associated fatal crash involvement" is a term of art used to describe crashes in which the driver was impaired by alcohol and a fatality, not necessarily a driver fatality, resulted from the crash.

⁵ J. C. Fell, *Alcohol Involvement in Fatal Accidents 1980-1984*, U.S. Department of Transportation, National Highway Traffic Safety Administration, National Center for Statistics and Analysis, Washington, DC (1985).

⁶ A. F. Williams, R. F. Rich, P. L. Zador, and L. S. Robertson, *The Legal Minimum Drinking Age and Fatal Motor Vehicle Crashes*, 12 *Journal of Legal Studies*, 219-39 (1975); R. Douglass, L. D. Filkins, and F. A. Clark, *The Effect of Lower Legal Drinking Ages on Youth Crash Involvement*, University of Michigan, Highway Safety Research Institute, Ann Arbor, MI (1974); P. J. Cook and G. Tauchen, *The Effect of Minimum Drinking Age Legislation on Youthful Auto Fatalities, 1970-1977*, 13 *Journal of Legal Studies* 169-190 (1984).

⁷ The six states that do not conform to the Surface Transportation Assistance Act's drinking age requirements are: Wyoming with a minimum alcohol purchase age of 19 since 1973, WYO. STAT. § 12-6-101(a)-(c) (Supp. July 1986); Montana with a minimum alcohol purchase age of 19

(footnote continues)

A. Scientific Studies Show Raising the Alcohol Purchase Age Reduces Highway Fatalities

Highway safety research organizations in the mid-1980s conducted several studies of the effects of alcohol purchase age laws on highway deaths. The results of three major studies published in 1985 and 1986, which take into account the experiences of many states, are summarized in the following section.

A study conducted by the National Highway Traffic Safety Administration compared the crash experience of drivers affected by laws raising the alcohol purchase age to the crash experience of drivers in the same states who were not affected by increases in the alcohol purchase age. The authors reported that the change in alcohol purchase age has a positive effect in 10 of the 13 states they studied. They estimated that fatal crashes involving alcohol-impaired drivers were reduced by 13 percent overall and that raising the alcohol purchase age to 21 in all states would save about 550 lives per year.⁸

The Insurance Institute for Highway Safety assessed the long-term effects of increasing alcohol purchase ages.⁹ The Institute analyzed the experience of the 26 states that had raised their purchase ages between 1975 and 1984. By the end of 1984, changes in the minimum purchase age had been in effect for more than two years in 19 of the 26 states and for more than

(footnote continued)

since 1979, MONT. CODE ANN. § 16-6-305 (1985); Ohio with a minimum purchase age of 19 for beer since 1982 OHIO REV. CODE ANN. §§ 4301.22, 4301.63 (Page 1982); Colorado with a minimum purchase age for 3.2 beer of 18 since 1945, COLO. REV. STAT. §§ 12-46-112, 12-47-128 (1985); Idaho with a minimum alcohol purchase age of 19 since 1972, IDAHO CODE § 23-949 (Supp. 1986); and, South Dakota, the Petitioner in this case, with a minimum purchase age of 19 for 3.2 beer since 1984, S.D. CODIFIED LAWS ANN. § 35-9-2 (1986).

⁸ R. Arnold, *Effect of Raising the Legal Drinking Age on Driver Involvement in Fatal Crashes: The Experience of Thirteen States*, U.S. Department of Transportation, National Highway Traffic Safety Administration, National Center for Statistics and Analysis, Washington, DC (1985).

⁹ W. DuMouchel, A. F. Williams, P. L. Zador, *Raising the Alcohol Purchase Age: Its Effect on Fatal Motor Crashes in 26 States*, *Journal of Legal Studies* (in press 1987).

four years in 14 states. The Institute analyzed state-age-year combinations for drivers ages 16 to 24 in fatal crashes in the 48 contiguous states.

As a result of increased alcohol purchase ages, there were 586 fewer 18- to 20-year-olds in fatal crashes, a 13 percent reduction. Eleven separate geographic regions of the country were examined for geographic variations in the effect. There was none. The absence of regional variations demonstrates the propriety of federal action to encourage the adoption of a national alcohol purchase age. In addition, the positive effect persisted beyond the early years of the change.

The Institute study also examined the impact of raising the alcohol purchase age on age groups other than those directly affected by the change, to see whether the positive effect was offset by any negative effects among the other age groups. Institute researchers found no such effect. If, as petitioner asserts, allowing 19- and 20-year-olds to purchase beer serves the public interest by teaching responsible drinking behavior, delaying the purchase age should have a negative effect on drivers when they are first able to legally purchase alcohol. The Institute finding suggests that having a low alcohol purchase age is not a factor in teaching young people to drink responsibly.

Because most drivers involved in fatal crashes are males,¹⁰ studies often use figures for the fatal crash involvement of males to evaluate methods for reducing highway fatalities.¹¹ The Institute found the beneficial effect of raising the purchase age on nighttime fatal crashes was proportionately greater for females (26 percent for females and 10 percent for males). Because several studies of the relationship between highway fatalities and alcohol purchase age have only looked at the

¹⁰ S. Baker, *et al.*, *supra* note 1, at 221.

¹¹ A. F. Williams, *Raising the Legal Purchase Age in the United States: Its Effects on Fatal Motor Vehicle Crashes*, 2 *Alcohol, Drugs, and Driving* 1, 5 (1986).

crash experience of males,¹² the Institute's findings indicate that overlooking the experience of females may result in underestimating the benefits of raising the alcohol purchase age.

The University of Michigan Transportation Research Institute also investigated the relationship between legal alcohol purchase ages and highway crashes. It reported positive initial and long-term effects on highway fatalities resulting from increasing the alcohol purchase age in Michigan. Over a six-year period, single-vehicle nighttime fatal crashes were reduced by an estimated 16 percent.¹³

Analyzing and interpreting changes in motor vehicle crash injury and fatality data are not simple, straightforward tasks. Many factors—some understood and others not—affect these events. To isolate the effect of a particular change such as raising the alcohol purchase age requires researchers to account for extraneous factors.

For example, the reductions in fatalities cited by South Dakota in its original complaint may have followed enhanced enforcement of drunk driving laws in the state,¹⁴ but they cannot be said to have resulted from these enforcement efforts. Similar reductions were reported nationwide. The cause of these reductions seems to be related to the state of the economy at the time.¹⁵ Generally, when the economy improves, motor vehicle fatalities increase. The reverse also applies. This relationship has held since the 1950s.¹⁶

¹² T. M. Klein, *The Effect of Raising the Minimum Legal Drinking Age on Traffic Accidents in the State of Maine*, U.S. Department of Transportation, National Highway Traffic Safety Administration, Washington, DC (1981); D. M. Maxwell, *The Effects of Government Regulation on Teenage Motor Vehicle Mortality*, U.S. Department of Transportation, National Highway Traffic Safety Administration, Washington, DC (1981); A. C. Wagenaar, *Effects of an Increase in the Legal Minimum Drinking Age*, 2 *Journal of Health Policy* 206 (1981).

¹³ A. C. Wagenaar, *Preventing Highway Crashes by Raising the Legal Minimum Age for Drinking: The Michigan Experience Six years Later*, *Journal of Safety Research* (in press 1987).

¹⁴ Petition for Writ of Certiorari, Appendix E, A-45.

¹⁵ B. O'Neill, *Recent Trends in Motor Vehicle Crash Deaths*, 6 *The Quarterly Journal* 29 (1984). *The Quarterly Journal* is published by the American Association for Automotive Medicine.

¹⁶ *Id.* at 31.

B. Petitioner's Studies Are Analytically Unsound

Recognizing the problems inherent in identifying sound and unsound studies measuring the effect of increasing the alcohol purchase age to 21, Congress asked the General Accounting Office (GAO) to evaluate the many studies on the subject. The GAO first identified criteria that such studies would have to meet in order to provide statistically sound results. It then searched the available literature for relevant studies and included in its evaluation only those that met the criteria. The GAO concluded that "raising the drinking age has, on average, a direct effect on reducing alcohol-related traffic accidents among affected age groups across states."¹⁷

The three studies cited in Subsection (A) above had research designs consistent with the standards in the GAO criteria, and they all reached conclusions consistent with GAO's evaluation. South Dakota's brief, however, offers a number of studies purporting to show no significant benefit from raising the alcohol purchase age.¹⁸ All but one¹⁹ of those studies are analytically flawed, and therefore they were not among those used by the GAO to evaluate the effect of raising the alcohol purchase age on highway fatalities.²⁰ The one study cited by South Dakota that met the GAO criteria has in fact been cited by the GAO as supporting raising the legal alcohol purchase age.²¹ The study found, "[t]he numbers of teenage nighttime single vehicle fatal accidents declined more in Massachusetts [which had raised the alcohol purchase age to 21] than in New York [which had not raised the alcohol purchase age during the study period], in the 18-19 year age group. Overall fatal accident trends among 16-19 year olds in the two states were

¹⁷ *National Minimum Drinking Age Law, Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 99th Congress, 2d Session, 36 (1986)* (statement of Eleanor Chelimsky, Director, Program Evaluation and Methodology Division, General Accounting Office).

¹⁸ Brief for Petitioner, at 47, note 1.

¹⁹ South Dakota cites R. W. Hingson, et al., *Impact of Legislation Raising the Legal Drinking Age in Massachusetts from 18 to 20*, 73 *American Journal of Public Health* 163 (1983). This is one of 14 studies used by the GAO in its evaluation of the research on drinking age laws and highway safety. See *Hearing*, supra note 17, at 10.

²⁰ *Hearing*, supra note 17, at 5, 10.

²¹ *Id.* at 10.

similar."²² The study concluded, "[t]he results of this study and others suggest that raising the legal drinking age may hold some promise of accident reductions."²³

The Bolotin and DeSario study cited by South Dakota used police reports of alcohol use.²⁴ Police reports are known to underestimate seriously driver alcohol use in crashes, and responsible researchers regard them as unreliable for analytic purposes.²⁵ In Texas, one of the states studied by Bolotin and DeSario, of the 285 fatally injured drivers who had blood alcohol concentrations (BAC) of 0.10 or greater, the police had identified alcohol as a contributing factor in only 34 percent.²⁶

Because some states are far more likely to collect BAC data on drivers in fatal crashes than other states, the Fatal Accident Reporting System (FARS), a data base maintained by the National Highway Traffic Safety Administration, cannot be used to provide valid state-by-state comparisons based on these BAC data. The FARS printouts bear the following warning on each page: "Due to differences among the states in reporting alcohol or testing drivers involved in accidents, it is not appropriate to compare alcohol in FARS on a state by state basis." Nonetheless, Bolotin and DeSario base their conclusions on just such comparisons.

Careful analysis has uncovered several problems with the quality and quantity of the data used by Bolotin and DeSario. In most of the states studied, fewer than half the drivers were tested for BAC. The availability of BAC information varied widely in the states used as paired comparisons: In Nebraska,

²² R. W. Hingson, et al., supra note 19, at 163.

²³ *Id.* at 169.

²⁴ F. N. Bolotin and J. DeSario, *The Politics and Policy Implications of a National Minimum Drinking Age*, Case Western Reserve University, Cleveland, OH (1985).

²⁵ J. A. Waller, *Factors Associated with Police Evaluation of Drinking in Fatal Highway Crashes*, 3 *J. Safety Research* 35 (1971); Hingson, supra note 19, at 166.

²⁶ O. J. Pendleton, R. Bremer, and S. Crowell, *Alcohol Involvement in Texas Driver Fatalities: Accident Reports vs. Blood Alcohol Concentration*, Texas Transportation Institute, Texas A&M University College Station, TX (1984). See also O. J. Pendleton and N. J. Hatfield, *Alcohol Involvement in Texas Driver Fatalities*, Texas Transportation Institute, Texas A&M University System (1986).

more than half of fatally injured drivers were tested for BAC, while in Kansas, its comparison state, only 20 percent were tested. Similar variability was found from year to year within the same state: In Indiana the percentage tested ranged from 9 percent to 40 percent during the study period.²⁷

The University of Pennsylvania Wharton School study reported that only 18-year-olds benefited from the increase in the purchase age for alcohol.²⁸ But the study did not use adequate statistical techniques. Reanalysis of the study's data, suggests that on average there were reductions in motor vehicle fatalities among 18-, 19-, and 20-year-olds after 21 was established as the minimum alcohol purchase age.²⁹

M.A. Males' studies,³⁰ which suggest that benefits from raising the minimum alcohol purchase age are more than offset by increases in alcohol associated fatalities among drivers when they are first legally able to purchase alcohol, are flawed largely because the comparisons he uses are inappropriately chosen to support his central argument. For Males to be correct, a negative effect on new drivers has to be demonstrated, and it has to be so strong that it would more than offset both improvements in driving skills and judgment that will have occurred in the period between ages 18 and 21. Research by DuMouchel et al., cited above, based on data similar to that used by Males, utilized appropriate statistical techniques. It directly contradicts Males' conclusion that raising the alcohol purchase age has negative results.

²⁷ A. F. Williams, P. Zador, and J. E. Wells, *There Is No "Other Side"—A Critique of the Bolotin-DeSario Study*, July/August Traffic Safety 12 (1986). See table for a complete breakdown of the amount of data available for states in each paired comparison in the Bolotin and De Sario study.

²⁸ J. M. Choukroun, I. Ravn, and C. Wagner, *The Relationship Between Increases in Minimum Purchase Age for Alcoholic Beverages and the Number of Traffic Fatalities*, The Wharton School, University of Pennsylvania, Philadelphia, PA (1985).

²⁹ Hearing, *supra* note 17, at 189 (statement of Allan F. Williams, Vice President, Research, Insurance Institute for Highway Safety).

³⁰ M. A. Males, *The Minimum Purchase Age for Alcohol and Young-Driver Fatal Crashes—A Long-Term View* (1984) and M. A. Males, *Three Drinking Age Anomalies* (1985).

The DuMouchel research,³¹ designed to test the Males' hypothesis, included analysis of the crash involvement rate for 17- to 21-year-old drivers, as a function of the number of years they had been allowed to purchase alcohol. Neither that analysis nor any other found evidence of negative effects on new drinkers. To the contrary, deferring the alcohol purchase age for a given age group appeared to have a beneficial spillover effect on adjacent age groups.

The Pensacola Junior College study by M.F. Morris³² cited by South Dakota uses data only for the period after the law change and therefore does not rule out the possibility that findings were part of a trend that was unrelated to the law change. It includes no appropriate comparison groups and consequently has no adequate controls. It presents no statistical tests to evaluate the significance of the findings. Finally, the study's measurement of alcohol use was based in part on police reports which, as shown above, are an unreliable indicator of driver alcohol use.

South Dakota asserts that variances in alcohol purchase age allow states to function as laboratories for "social and economic experiments without risk to the rest of the country." ³³ But such experimentation results only in the loss of life. Assuming *arguendo* that South Dakota has the right to put its own citizens at risk, it has no right to endanger the citizens of other states passing through South Dakota, the young people drawn to South Dakota to drink there, or those on either side of the South Dakota border who share the roads with them.

Statistically sound research has shown a consistent pattern of lowering the number of fatalities from motor vehicle crashes, both for persons of the affected age groups and for those even younger, with no adverse effects among 21-year-olds when they first are legally able to purchase alcohol. As a tool to save young lives, raising the minimum alcohol purchase age to 21 works.

³¹ W. DuMouchel, et al., *supra* note 12.

³² M. F. Morris, *Drinking-Driving Behavior in Florida; Drinking-Driving Behavior in Illinois and Tennessee*, Pensacola Junior College, Pensacola, FL (Undated).

³³ Brief for Petitioner, at 36.

II. YOUTHFUL INVOLVEMENT IN ALCOHOL-RELATED MOTOR VEHICLE CRASHES IS A NATIONAL PROBLEM REQUIRING FEDERAL ACTION

In this era of motor vehicle mobility, it is well known that states with lower drinking ages attract youths from other states.³⁴ The results are predictable and disastrous. The effect of one state's low drinking age affects the surrounding states. Resulting crashes do not always happen in the state where the drinking occurred. The home state of a driver who crosses the border to drink incurs losses in time expended by law enforcement officials and medical personnel, and in long-term health care costs. The home state is virtually powerless to correct the cross-boundary youth drinking problem.

A legal minimum alcohol purchase age of 21 is the *only* countermeasure aimed at alcohol-impaired driving that has been shown to have a long-term effect. The way to secure these benefits is to have the law uniform throughout the states. Federal intervention appears necessary to achieve a uniform national drinking age. Before passage of the drinking age provisions of the Surface Transportation Assistance Act, 56 percent of the borders in the country separated states with different drinking ages.³⁵

The federal government has a legitimate and compelling interest in attempting to reduce the deaths and injuries from drinking and driving. In 1924, the Secretary of Commerce, Herbert Hoover, called upon interested groups throughout the country to convene in a National Conference on Street and Highway Safety.³⁶ Subsequent conferences stressed the need for uniformity in the states' laws and led to the establishment of the National Committee on Uniform Traffic Laws and Ordinances and the Manual on Uniform Traffic Control Devices.

³⁴ 130 Cong. Rec. S8214 (daily ed. June 26, 1984) (Statement of Sen. Specter).

³⁵ *Hearing, supra* note 17, at 34.

³⁶ *The Federal Role in Highway Safety*, H.R. Doc. No. 93, 86th Cong., 1st Sess. (1959).

The federal interest and role was firmly set with the passage of the Motor Vehicle and Highway Safety Acts in 1966.³⁷

Scientific studies have repeatedly shown that reductions in deaths and injuries among youthful drivers can be made by raising the minimum alcohol purchase age. The statistical evidence is compelling and supports intuitive reasoning that individuals should not be learning to drink and to drive at the same time. Congress has chosen a reasonable method of securing some of the benefits of this knowledge through the passage of the Surface Transportation Assistance Act and its provisions relating to a national alcohol purchase age.

³⁷ National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* and Highway Safety Act of 1966, 23 U.S.C. §§ 401 *et seq.*

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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